Supreme Court, U. S.
FILED
DEC 5 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-900

MAJOR EDWARD PAYNE,

Petitioner,

VS.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BERNARD A. BERKMAN
BERKMAN, GORDON, KANCELBAUM AND LEVY
2121 THE ILLUMINATING BUILDING
55 PUBLIC SQUARE
CLEVELAND, OHIO 44113
(216) 781-5245

JAMES R. WILLIS
BOND COURT BUILDING
CLEVELAND, OHIO 44114
(216) 523-1100

Attorneys for Petitioner

BROWNPRINT INC. — LEGAL DIVISION, CLEVELAND, OHIO 44113 (216) 621-2944

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	- v -
OPINIONS BELOW.....	2
JURISDICTION.....	2
QUESTIONS PRESENTED FOR REVIEW.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	4
STATEMENT OF THE CASE.....	6
A. Procedural History.....	6
B. Facts	
1. The Theft in Office Conviction.....	7
2. The Intimidation Conviction.....	14
3. The Decisions of the Lower Appellate Courts.....	17
REASONS FOR GRANTING THE WRIT	
I. An Important Question, Decided By The Lower Courts In A Way Probably Not In Accord With Applicable Decisions Of This Court, Is Presented Concerning The Constitutional Validity, Under the Sixth	

TABLE OF CONTENTS (CONT.)

	Page
And Fourteenth Amendments, Of The Action Of A State Appellate Court In Altering The Charge Originally Brought Against An Accused In The Course Of Affirming His Conviction.....	20
II. An Important Question, Decided By The Lower Courts In A Way Probably Not In Accord With Applicable Decisions Of This Court, Is Presented Concerning The Constitutional Validity, Under The Sixth And Fourteenth Amendments, Of The Action Of A State Appellate Court In Affirming A Criminal Conviction On The Basis Of An Entirely Different Theory Of The Case From That Which The State Advanced In The Trial Court To Secure The Conviction.....	28
III. An Important Question, Decided By The Lower Courts In A Way Probably Not In Accord With Applicable Decisions Of This Court, Is Presented Concerning The Right Of An Accused, Under The Sixth And Fourteenth Amendments, To Confront The Witness Against Him.....	34

TABLE OF CONTENTS (CONT.)

	Page
CONCLUSION.....	37
APPENDIX (separately bound)	
Order of the Ohio Supreme Court Denying Motion for Rehearing.....	1
Order of the Ohio Supreme Court Dismissing Petitioner's Appeal of Right.....	2
Order of the Ohio Supreme Court Overruling Petitioner's Motion for Leave to Appeal.....	3
Order of the Court of Appeals, Eighth Appellate District, Cuyahoga County, Ohio, Overruling Petitioner's Motion for Reconsideration.....	4
Journal Entry of the Court of Appeals, Eighth Appellate District, Cuyahoga County, Ohio, Affirming Petitioner's Convictions.....	5
Opinion of the Court, by Judge Patton.....	5
Concurring Opinion of Judge Corrigan.....	23
Dissenting Opinion of Judge Jackson.....	28

TABLE OF CONTENTS (CONT.)

	Page
Excerpt from Petitioner's Memorandum in Support of Jurisdiction, filed in the Ohio Supreme Court.....	84
Excerpt from Petitioner's Memorandum in Support of Application for Reconsideration, filed in the Court of Appeals, Eighth Appellate District, Cuyahoga County, Ohio.....	110

TABLE OF AUTHORITIES

Cases	Page
Barber v. Page, 390 U.S. 719 (1968)	35
Bruton v. United States, 391 U.S. 123 (1968)	35
California v. Green, 399 U.S. 149 (1970)	35
Chapman v. California, 386 U.S. 18 (1967)	27,36
Cole v. Arkansas, 333 U.S. 196 (1948)	24,25,34
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	22
Faretta v. California, 422 U.S. 806 (1975)	23
Katz v. United States, 389 U.S. 347 (1967)	22
Pointer v. Texas, 380 U.S. 400 (1965)	35
Russell v. United States, 369 U.S. 749 (1962)	23,25, 26,34
Constitutional Provisions	
Sixth Amendment	3,4,19, 20,23,28, 34,35,36
Fourteenth Amendment	3,4,19, 20,23,28, 34,35,36
Statutory Provisions	
28 U.S.C. §1257(3)	2
Ohio Revised Code, Section 2921.41	1,4,6
2921.03	1,5,6,23

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. _____

MAJOR EDWARD PAYNE,

Petitioner,

-vs-

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

Major Edward Payne, petitioner, prays that a writ of certiorari issue to review the final judgment and decree of the Ohio Supreme Court dismissing petitioner's appeal as of right and overruling petitioner's motion for leave to appeal from the decision of the Court of Appeals, Eighth Appellate District, Cuyahoga County, Ohio, affirming the petitioner's convictions of Theft in Office, under Ohio Revised Code Section 2921.41, and Intimidation, under Ohio Revised Code Section 2921.03. The final judgment and decree of the Ohio Supreme Court was originally entered on July 6, 1978. Petitioner's motion for rehearing was denied on September 7, 1978 by the Ohio Supreme Court.

OPINIONS BELOW

The Ohio Supreme Court rendered its orders without opinion. Its orders in this case are set forth in the separately bound appendix to this petition, at 1 - 3. The opinion of the Court of Appeals, Eighth Appellate District, Cuyahoga County, Ohio, which is unreported, is set forth in the Appendix at 5 - 83. No opinion was delivered in the Court of Common Pleas, Cuyahoga County, Ohio, the trial court in this case.

JURISDICTION

The orders of the Ohio Supreme Court dismissing petitioner's appeal as of right and overruling his motion for leave to appeal were issued on July 6, 1978. On September 7, 1978, the Ohio Supreme Court entered its order denying the petitioner's motion for rehearing.

This petition seeks review of a final judgment and decree rendered by the highest court of the State of Ohio in which a decision could be had, in a case in which titles, rights, privileges and immunities are specially set up and claimed by the petitioner under the Constitution of the United States. This Court has jurisdiction to review the judgment and decree of the Ohio Supreme Court in this case under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

I.

Where, in a state criminal prosecution resulting in the petitioner's conviction, there was no evidence to support one of the elements of the crime as charged in the indictment and the bill of particulars,

where the State assumed the burden of proving that element and promised the jury that it would prove that element beyond a reasonable doubt, and where the trial court instructed the jury, without objection by the State, that such element was one of the essential elements of the offense charged, was the petitioner denied his Sixth and Fourteenth Amendment rights to be informed of the charge against him and to due process when a state appellate court affirmed the petitioner's conviction upon a determination that it had been unnecessary for the State to allege and attempt to prove such element?

II.

Where, in a state criminal prosecution, two of the three judges sitting on the state appellate court to which the petitioner had appealed his conviction determined that the trial court had erroneously admitted certain hearsay testimony, where that testimony had constituted the most crucial evidence to support a fact which was central to the State's entire theory of the case, and where the petitioner had built his central defense around his contention that such fact did not exist, was the petitioner denied his Sixth and Fourteenth Amendment rights to be informed of the charge against him and to due process when the judge who cast the deciding vote in the state appellate court determined that the error had been harmless, because the State had not been required to prove the disputed fact, as a result of which determination the petitioner's conviction was affirmed on the basis of an entirely different theory of the case from that which the State had advanced in the trial court to secure the conviction?

III.

Where, in a state criminal prosecution brought against the petitioner, testimony concerning the contents of a written statement made by an unidentified and absent declarant was admitted on a crucial point, for the purpose of proving the truth of the matter asserted in the written statement, was the petitioner deprived of his Sixth and Fourteenth Amendment right to confront the witnesses against him?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 6:

> "In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him...."

United States Constitution, Amendment 14:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law...."

Ohio Revised Code, §2921.03:

> "Intimidation.
>
> (A) No person, knowingly and by force or by unlawful threat of harm, shall attempt to influence, intimidate or hinder a public servant, party official, or witness in the discharge of his duty.
>
> (B) Whoever violates this section is guilty of intimidation, a felony of the third degree."

Ohio Revised Code, §2921.41:

> "Theft in Office.
>
> (A) No public official or party official shall commit any theft offense, when either of the following applies:
>
> (1) The offender uses his office, or permits, or assents to its use, in aid of committing the offense;
>
> (2) The property or service involved is owned by this or any other state or the United States, a municipality, or any political subdivision, department, or agency of any of them, or by a political party, or is part of a political campaign fund.
>
> (B) Whoever violates this section is guilty of theft in office, a felony of the third degree.
>
> (C) A public servant or party official who is convicted of theft in office is forever disqualified from holding any public office, employment, or position of trust in this state."

STATEMENT OF THE CASE

A. Procedural History

On November 17, 1975, Major Edward Payne, the petitioner, was indicted by the grand jury of Cuyahoga County, Ohio, on two counts of Theft in Office, under Ohio Rev. Code §2921.41, and two counts of Intimidation, under Ohio Rev. Code §2921.03. A jury trial held in the Court of Common Pleas of Cuyahoga County, Ohio, in February, 1976, resulted in petitioner's conviction on one count of Theft in Office, which count had charged him with having "...obtained for his own use two 9-millimeter firearms, with pearl handles, from property lawfully seized by and in the possession of the Cuyahoga County Sheriff's Department," and on one count of Intimidation, which count had charged the petitioner with intimidation of Donald Campbell, a public servant, in the discharge of his duty. Judgment of acquittal was entered by the trial court on the other charge of Intimidation, and the jury acquitted the petitioner on the other charge of Theft in Office. The trial court imposed prison sentences of two to ten years and three to ten years upon the petitioner for his convictions, the sentences to run concurrently.

On appeal, the petitioner's convictions were affirmed by a divided Court of Appeals for the Eighth Appellate District, Cuyahoga County, Ohio. The petitioner's subsequent application for reconsideration was denied by that court on March 21, 1978. Thereafter,

on July 6, 1978, the petitioner's appeal as of right to the Ohio Supreme Court was dismissed on the ground that no substantial constitutional question was presented. At the same time, that court overruled the petitioner's motion for leave to appeal. Major Payne's petition for rehearing was denied by the Ohio Supreme Court on September 7, 1978.

B. Facts

1. The Theft in Office Conviction

The petitioner was convicted of Theft in Office upon a charge that he had converted to his own use "...two 9-millimeter firearms, with pearl handles, from property lawfully seized by and in the possession of the Cuyahoga County Sheriff's Department." The evidence at trial revealed that the petitioner, who in 1975 was a Major in the Cuyahoga County Sheriff's Department and the warden of the Cuyahoga County jail, was selected by the Sheriff to head a new division in the Sheriff's Department known as Division 4 (Transcript, p 565).[1/] As the head of Division 4, Major Payne commandeered a considerable number of raids on after-hours places and cheat-spots in Cuyahoga County (Tr. 577), including one on April 19, 1975, at 10001 Cedar Avenue in Cleveland, Ohio (Tr. 505). What occurred immediately after that raid was a matter of great dispute in the trial court, a

---

1/ References to the reporter's transcript of proceedings in the trial court will hereinafter be designated by the abbreviation "Tr."

dispute which went to the very heart of this case.

The principal witness for the State was Donald W. Campbell,[2] who had been employed by the Sheriff's Department as a Deputy Trainee in January, 1975 (Tr. 22). At the end of February or beginning of March of that year, he began working in Division 4, where his superior officer was Major Payne, the petitioner (Tr. 23). He testified that in the early morning hours of April 19, 1975, Major Payne planned and executed a raid at 10001 Cedar Avenue (Tr. 25). Campbell himself did not participate in that raid, but remained at Division 4 (Tr. 25), which was located on the fourth floor of the County Jail (Tr. 511).

When the raiders returned that morning, Campbell observed deputies carry into Division 4 evidence that had been seized at the raid (Tr. 27). He also observed several weapons in Division 4 that morning, including two 9-millimeter pearl-handled firearms which were in plastic bags (Tr. 28-30). Campbell did not specifically say, however, nor did the prosecution ask him, whether or not those two 9-millimeters had been part of the evidence he had observed the deputies carry into Division 4, upon their return from the Cedar raid.

Campbell testified that those two pearl-handled firearms were taken out of

---

[2] The prosecution called a total of five witnesses. With respect to the Theft in Office charges, however, for all practical purposes, Campbell was the State's only witness.

the plastic bags and placed in a brown paper bag by Detective Hosea Garner (Tr. 30). Shortly thereafter, Major Payne, who had requested those firearms from Detective Garner (Tr. 32), transported the firearms out of the fourth-floor office of Division 4 (Tr. 31).

Campbell was the only witness who testified that the petitioner carried two pearl-handled guns out of the fourth-floor office of Division 4 on the morning of April 19, 1975. By way of contrast, numerous witnesses who participated in the Cedar raid and who were present at Division 4 following the raid, testified that neither Major Payne nor Donald Campbell was even in Division 4 on April 19 following the raid. (Deputy Thornton, Tr. 626; Deputy Burress, Tr. 661, 683; Deputy Bly, Tr. 760, 761; Detective Garner, Tr. 1114, 1115; Marion Koszewski, Tr. 981). Detective Garner took the stand and flatly denied that he gave Major Payne any firearms on April 19 (Tr. 1115).

For several reasons, it was essential to the State's case to prove that the two pearl-handled firearms, allegedly carried out of the fourth-floor office of Division 4 by Major Payne, had been seized, earlier, by the Sheriff's Department at the Cedar Avenue raid.

First, proof linking the pearl-handled guns to the Cedar raid was an essential link in the chain of circumstantial evidence upon which the State relied to prove that when Major Payne carried those guns out of the fourth-floor office of Division 4, he intended to convert them to his own use. Inasmuch as the petitioner was the head of Division

4, the warden of the County Jail, and a Major in the Sheriff's Department, it obviously was no crime for him to handle evidence in the Sheriff's custody, or to transport evidence in the Sheriff's custody from one room to another in the County Jail Building, or to perform any number of perfectly legitimate functions in the course of his official duties which would require him personally to carry evidence in the Sheriff's custody from one location to another. Since there was no evidence at all to demonstrate what the petitioner did with the pearl-handled guns or where he transported them after carrying them out of the fourth-floor office of Division 4, the State relied upon other evidence in its attempt to prove that Major Payne carried those guns out of the Division 4 office, not in connection with any legitimate official purpose he might have had as the head of Division 4, but for the purpose of converting those firearms to his own personal use. That other evidence, however, was entirely based on the premise that the pearl-handled guns had been seized by the Sheriff's Department at the Cedar raid.

Donald Campbell testified that the customary practice of Division 4 members following a raid was to enter, in the Sheriff's property book, under a heading which includes the address of the place raided and the date of the raid, a complete list of each item seized on the raid (Tr. 56-59). He also testified that it was standard procedure for Division 4 members to include a complete list of all items seized on a raid in the inventory returned with the search warrant that authorized the raid (Tr. 34-38). An

examination of the Sheriff's property book revealed that the two pearl-handled guns were not included in the list of items seized at the April 19th Cedar Avenue raid, however (Tr. 56-59). Similarly, the two pearl-handled guns were not included in the list of items entered in the inventory returned with the search warrant which authorized the April 19th Cedar raid (Tr. 34-38). Assuming that the pearl-handled guns had, in fact, been seized at the Cedar raid, the evidence showed that Major Payne carried them out of the fourth-floor office of Division 4 before the fact of their seizure at the Cedar raid was recorded in writing either in the Sheriff's property book or in the inventory returned with the search warrant, a fact which, under the State's view, was inconsistent with his carrying those guns out of the Division 4 office for some legitimate function in connection with his official duties as the head of Division 4. Rather, under the State's view, such evidence demonstrated that Major Payne attempted to conceal the existence of those pearl-handled firearms, a fact consistent with the State's contention that he intended to convert those guns to his own use.

It was also essential for the State to prove that the pearl-handled guns had been seized at the Cedar raid in order to demonstrate that the guns carried out of the Division 4 office actually belonged to the Sheriff's Department, thereby ruling out the possibility that the guns belonged to the petitioner.

Finally, it was essential for the State to link the pearl-handled guns to the Cedar raid in order for it to fulfill

the promises it had made to the jury in opening statement and to prove its entire theory of the case, which had been consistently that Major Payne took for his own use two pearl-handled guns that had been lawfully seized by the Sheriff's Department during the course of a raid on April 19, 1975, at 10001 Cedar Avenue.

The State introduced three pieces of circumstantial evidence in its attempt to prove that the pearl-handled firearms had been seized at the Cedar raid. One such piece of evidence was the testimony of James Marino, a news reporter, who had been present at the Cedar raid (Tr. 505). He testified that Major Payne told him that six handguns and one shotgun had been seized at Cedar (Tr. 506). The Sheriff's property book had entries for only four pistols and a shotgun under the April 19th Cedar raid listing (Tr. 59). Another piece of circumstantial evidence linking the pearl-handled guns to the Cedar raid was provided by the testimony of Sims Goodman, Jr.[3] He testified that he was in the vicinity when the Cedar raid occurred (Tr. 303-304). After the raid was over, Goodman remained in the area and observed two persons whom he knew come out from the direction of where the raid took place (Tr. 307). They were

[3] Goodman was an informant for the Cleveland Police Department (Tr. 332), which, according to Goodman, was "out to get Major Payne" (Tr. 333), apparently because the petitioner's raids on cheat-spots were interfering with payoffs to Cleveland policemen (Tr. 377). He admitted that the police department enlisted him to secure evidence against petitioner (Tr. 334-335).

"high rollers" (big gamblers) named Ivan Lapsley and Big Jordan (Tr. 307). Goodman stated that on prior occasions he had seen them carrying 9-millimeter automatic pistols with snow white grips (Tr. 309-310). A few days after the raid, Goodman observed them carrying different firearms (Tr. 311).[4] But the most crucial evidence linking the guns to the Cedar raid was the testimony of Donald Campbell, admitted over the petitioner's objection. Campbell testified that there were yellow tags inside the plastic bags which contained the two pearl-handled firearms he had observed in Division 4 (Tr. 29). Over defense objection, Campbell was permitted to testify that written on the tags was an address--10001 Cedar Avenue (Tr. 29).

The evidence tending to prove that no pearl-handled firearms had been seized at the Cedar raid was both direct and substantial. Several witnesses who had been present at the raid testified that they saw no pearl-handled automatic pistols there (Powell Caesar, Tr. 729-730; Deputy Burress, Tr. 689; James Marino, Tr. 514;

[4] On cross-examination by appellant's trial counsel, Goodman also testified that Jordan told him, "that nigger Payne got my gun." (Tr. 371). The significance, if any, of that hearsay testimony is unclear, at best. Jordan was not arrested at Cedar, and would have had no way of knowing that Major Payne took his gun from Division 4. Thus, if Goodman's testimony is credited, it would appear to indicate that Major Payne took Jordan's gun directly from him; and that the firearms Campbell saw the petitioner remove from Division 4 were other firearms.

Detective Garner, Tr. 1114-1115). Furthermore, both Big Jordan and Ivan Lapsley denied ever having owned 9-millimeter firearms with snow white grips (Tr. 855, 882).

Nevertheless, the petitioner was found guilty of the charge that he had converted to his own use two pearl-handled guns that had been lawfully seized by the Sheriff's Department.

2. The Intimidation Conviction

The petitioner was also convicted on a charge that he had intimidated Deputy Trainee Campbell, a public servant, in the discharge of his duty. This conviction was closely connected to the Theft in Office charge. Indeed, the petitioner's conviction of Intimidation was dependent upon his conviction of Theft in Office, because it was the alleged commission of a theft offense by the petitioner which gave him a motive and reason for the alleged intimidation of Campbell.

Campbell testified that on July 3, 1975, while engaged in undercover work, he was attacked by six men in front of a downtown bar, thereby sustaining substantial injuries (Tr. 106-107). Because of those injuries, he was unable to work and was confined to his home throughout the month of July.[5] During that month, Campbell was visited several times by

[5] Campbell never did return to work as a deputy sheriff; the Sheriff placed Campbell on extensive disability after he was injured, and on December 15, 1975, the Sheriff fired him (Tr. 120).

officers of the Sheriff's Department, including Major Kulis, Marion Koszewski, and Captain Brown (Tr. 108-110). Each of these visitors desired to talk about Major Payne's activities, and each also requested that Campbell turn over to him certain notes Campbell had been keeping concerning irregularities in Division 4,[6] including the alleged theft of the two pearl-handled guns by the petitioner, but Campbell refused to satisfy their requests. (Tr. 108, 111-112, 117, 187).[7]

Campbell further testified that on August 1, 1975, Major Payne invited Campbell and his wife to meet him at a cocktail lounge in Cleveland the following night (Tr. 113). The petitioner told Campbell that he had already arranged for Phillip

[6] These notes were never produced at trial. Campbell testified that they were stolen from his home in a burglary in November of 1975 (Tr. 152). Campbell stated that nothing else was stolen in the burglary--just his notes from his attache case (Tr. 152). Judith Campbell, Donald Campbell's wife, also testified that the notes were stolen, but she stated that the burglary occurred in October of 1975 (Tr. 427).

[7] Koszewski and Brown, who testified for the defense, disputed Campbell's testimony. They testified that their visits to Campbell's home were actually for the purpose of interviewing Campbell about his own activities (Tr. 987, 1040).

Vari, Campbell's partner, to be there as well (Tr. 113). The next night, August 2, 1975, the Campbells and Vari drove together to the cocktail lounge, arriving at about 9:00 p.m. (Tr. 114). They met Major Payne in the lounge and sat down with him (Tr. 114). The conversation was pleasant, initially, but later in the evening it began to focus on the visits Campbell had received during the month of July from officers of the Sheriff's Department (Tr. 116). Major Payne asked if Campbell had been cooperating with those members of the Sheriff's Department (Tr. 116). When Campbell answered that he was not cooperating, the petitioner asked Campbell to relinquish "everything he had" to the petitioner, a request with which Campbell refused to comply (Tr. 116). When Campbell persisted in his refusal to relinquish his notes, which allegedly contained information concerning the theft by the petitioner of the pearl-handled guns (Tr. 187, 111, 117), Major Payne allegedly said to Campbell, "If you don't cooperate with me, I'll make sure you never get to court." (Tr. 119). In answer to Campbell's inquiry as to what was meant by that statement, the petitioner allegedly answered, "Don't cooperate with me and you'll find out." (Tr. 119). With that, the Campbells and Vari stood up and departed, at about 12:00 or 12:15 a.m. (Tr. 119).[8]

[8] Both Judith Campbell and Phillip Vari agreed with Campbell's version of this August 2 meeting, when they testified. Defense witness Keldon Casey did not, however. He testified that Major Payne introduced him to the Campbells and Vari that night at the Eastown (Tr. 937, 939), that he sat down with the Campbells and Vari until they left at about 2:00 a.m. (Tr. 939), and that during that time there was no conversation concerning the Sheriff's Department (Tr. 945).

The jury returned a verdict of guilty on the charge that the petitioner on August 2, 1975, intimidated Donald Campbell, a public servant, in the discharge of his duty.

C. The Decisions of the Lower Appellate Courts

On appeal to the Court of Appeals, Eighth Appellate District, Cuyahoga County, Ohio, Major Payne advanced a number of arguments pertinent to the present petition.

First, he argued that the evidence had been insufficient as a matter of law to prove one of the elements of the crime of Theft in Office, as that crime had been charged in the indictment. In particular, the indictment had charged that the petitioner had taken two pearl-handled guns that had been "lawfully seized" by the Sheriff's Department. Similarly, the Bill of Particulars alleged that the guns had been lawfully seized. The prosecutor, in his opening statement, promised the jury that he would prove that the guns had been lawfully seized (Tr. 19-20). The trial court instructed the jury that one of the elements of the crime charged was that the guns had to have been lawfully seized (Tr. 1289). The trial court defined for the jury what constituted a lawful seizure (Tr. 1291). These instructions were given without objection by the State. The petitioner argued in the court of appeals that there had been a failure of proof on that element. But the court of appeals ruled that it had been altogether unnecessary for the State to allege and prove, as one of the elements of the crime, the

lawfulness of the seizure of the pearl-handled guns.[9] Accordingly, that court ruled, it could affirm petitioner's conviction notwithstanding the absence of proof to support what the State, the trial court and the defense understood to be one of the elements of the crime. In his application for reconsideration in the court of appeals, and in his memorandum in support of jurisdiction filed in the Ohio Supreme Court, the petitioner argued that the affirmance of his conviction in this fashion by the court of appeals deprived him of his constitutional rights to be informed of the charges against him and to due process (See App. at 110, 114-119, 85-89). This argument was rejected without opinion by both courts, however.

The petitioner also argued in his initial brief in the court of appeals that the trial court had erred in admitting Campbell's oral testimony that written on the yellow tags which were in the plastic bags containing the pearl-handled guns was the address 10001 Cedar Avenue. The petitioner noted that that oral testimony was the most important piece of evidence linking the pearl-handled guns to the Cedar raid, and was, therefore, central to the State's case. Two of the three court of appeals' judges agreed that the trial court had erred in admitting that hearsay testimony (See Judge Corrigan's concurring opinion at App. 24, and Judge Jackson's dissenting opinion at App. 45-54). However, only the dissenting judge found the error to be prejudicial. The concurring judge found the error to be harmless, a conclusion

---

[9] See pp. 15-16 of the separately bound Appendix to this petition for a writ of certiorari.

which was based on two premises. First, the concurring judge determined that the error was not of constitutional dimension and, thus, did not have to be harmless beyond a reasonable doubt (See App. 24). Second, the concurring judge agreed with the judge who wrote the opinion for the court that it was not essential to the State's case that it prove the guns had been seized at the Cedar raid, notwithstanding the fact that the State's entire entory of the case had always been that the petitioner had stolen two pearl-handled guns seized by the Sheriff's Department at 10001 Cedar Avenue on April 19, 1975, and notwithstanding the fact that the petitioner had built his central defense around his contention that no pearl-handled guns had been seized at the Cedar raid (See App. 24, 18, 13). In his application for rehearing in the court of appeals, and in his memorandum in support of jurisdiction in the Ohio Supreme Court, the petitioner argued that, contrary to the conclusion of the concurring judge in the court of appeals, the admission by the trial court of Campbell's hearsay testimony was an error of constitutional dimension in that it deprived the petitioner of his Sixth and Fourteenth Amendment right to confront the witnesses against him (See App. 111-114, 90-98). The petitioner further argued that by affirming his conviction on the premise that the State had not been required to prove that the pearl-handled guns had been seized at the Cedar raid, the court of appeals deprived the petitioner of his Sixth and Fourteenth Amendment rights to be informed of the charge against him and to due process in that the affirmance of petitioner's conviction was based upon an entirely different theory of the case from that which the

State had advanced in the trial court to secure the conviction (See App. 114-119, 99-105). These arguments were also rejected without opinion by both courts, however.

Finally, the petitioner argued in his initial brief in the court of appeals and in his memorandum in support of jurisdiction in the Ohio Supreme Court that any error necessitating a reversal of his Theft in Office conviction also required a reversal of his conviction of Intimidation, because of the close connection between the two charges (See App. 106-109; 11-12). In view of the fact that the court of appeals had found the petitioner's conviction of Theft in Office to be free of error, it rejected this argument, however, as did the Ohio Supreme Court, implicitly, when it refused to hear petitioner's appeal.

REASONS FOR GRANTING THE WRIT

I.

An Important Question, Decided By The Lower Courts In A Way Probably Not In Accord With Applicable Decisions Of This Court, Is Presented Concerning The Constitutional Validity, Under The Sixth And Fourteenth Amendments, Of The Action Of A State Appellate Court In Altering The Charge Originally Brought Against An Accused In The Course Of Affirming His Conviction.

The indictment returned by the grand jury in this case charged the petitioner, in one count, with having "obtained for his own use two 9-millimeter firearms with pearl handles on same, from property lawfully seized by and in possession of the Cuyahoga

County Sheriff's Department...." (Emphasis added). The Bill of Particulars supplied to the petitioner repeated this same language, informing him that the State intended to prove, as an element of the charge, that the pearl-handled firearms had been lawfully seized by the Sheriff's Department. In its opening statement to the jury, the State promised that it would prove beyond a reasonable doubt that the pearl-handled guns had been lawfully seized by the Sheriff's Department (Tr. 19-20). The trial court instructed the jury that one of the five elements of the offense with which the petitioner was charged was that the pearl-handled guns had to have been lawfully seized, and that before the jury could return a guilty verdict, it had to find that each of the five elements had been proven by the State beyond a reasonable doubt (Tr. 1288). The trial court elaborated on this element of the crime charged by defining for the jury what constituted a lawful seizure (Tr. 1291). At no time did the State object to the instructions given to the jury by the trial court. The trial court, without objection by the State, caused verdict forms to be prepared and submitted to the jury in which the verdict form for "guilty" of theft in office included a finding that the guns had been lawfully seized. It was that verdict form which the jury signed, thereby representing to the petitioner that it had found beyond a reasonable doubt that the guns had been lawfully seized (Tr. 1300). In short, the State and the trial court, by repeated affirmative actions, led the petitioner to believe that the lawful seizure of the guns was one of the essential elements of the crime with which he was charged and that, in order to escape conviction, he need only raise a reasonable doubt as to the existence of that element

or, in the event of an adverse result, he need only demonstrate to the court of appeals that the evidence was insufficient to prove that element in order to obtain a reversal of his conviction.

There was a total failure of proof, however, that the two pearl-handled guns had, in fact, been lawfully seized. The State was unable to offer a single shred of evidence concerning who seized those guns, or the manner and circumstances under which those guns had been seized.

To be sure, the State attempted to fulfill its promise to the jury that it would prove the element of lawful seizure. The State introduced a search warrant that had been obtained by Deputy Edward Thornton prior to the April 19th raid at 10001 Cedar Avenue (Tr. 38), but that search warrant did not authorize the seizure of any firearms at 10001 Cedar Avenue (State's Exhibit 1-D). Thus, assuming that the two pearl-handled guns had been seized at the Cedar raid, as the State contended, that seizure was a warrantless seizure, and presumptively unlawful.

This Court has consistently held that warrantless searches and seizures are unlawful, except in a few specifically established and well-delineated situations. Coolidge v. New Hampshire, 403 U.S. 443 454-455 (1971); Katz v. United States, 389 U.S. 347, 356 (1967). Inasmuch as there was a total absence of evidence in the present case concerning the manner or circumstances of the seizure of the two pearl-handled guns, no inferences that the seizure of the guns was authorized by an exception to the warrant requirement were possible.

Nor did the court of appeals, in rejecting petitioner's argument that there had been a failure of proof of the element of lawful seizure, in any way intimate that the State had introduced any evidence to prove that the seizure of the guns had been lawful. Rather, the court of appeals concluded that in order to convict the petitioner of Theft in Office under Ohio Revised Code Section 2921.41, it had been unnecessary for the State to allege and attempt to prove that the guns had been lawfully seized by the Sheriff's Department; consequently, the petitioner's conviction could be upheld without regard to the fact that the State had failed to prove the lawfulness of the seizure (See App. 15-16). But as Judge Jackson of the court of appeals noted in dissent, "...the fact that the State of Ohio could have prosecuted the [petitioner] for a crime against 'mere possession' does not change the fact tha the State did prosecute the [petitioner] for a crime against 'lawful possession'." (Emphasis in original; See App. 34-35).

The Sixth Amendment, made applicable to the states by way of the Fourteenth Amendment, Faretta v. California, 422 U.S. 806 (1975), entitles an accused to fair notice of the specific charge against which he must defend, and entitles him to a charging instrument which is not misleading, but is sufficiently certain, unambiguous and precise to enable him to prepare a meaningful defense and avoid surprise. Russell v. United States, 369 U.S. 749 (1962). In the present case, that fundamental right was denied petitioner when the court of appeals ruled that the State had not been required to prove what the State time and time again represented to the petitioner it would prove.

This Court's decision in Cole v. Arkansas, 333 U.S. 196 (1948), is instructive on this issue. There the petitioners had been convicted under a provision of an Act of the Arkansas legislature which prohibited the promotion or encouragement of any unlawful assemblage at or near a labor dispute. In the trial court, the case had been tried as an offense under that provision of the Act, and the jury had been instructed under that provision of the Act. The State Supreme Court upheld the convictions, however, without considering the defendants' attacks on the constitutionality of that particular provision of the Act, by holding that the conviction could be sustained under another provision of the same Act, which prohibited the use of force or violence to prevent any person from engaging in any lawful vocation. The State Supreme Court reasoned that it could uphold the convictions on this basis because the information pursuant to which the defendants had been charged included an allegation that the defendants had used force or violence to prevent an individual from working. This Court reversed, holding that the affirmance of petitioners' convictions under a different provision from the one under which they had been charged violated the most fundamental principles of due process--the rights of an accused to be informed of the specific charge against him and to have the opportunity to be heard in a trial of the issues raised by that charge. At 333 U.S. 202, this Court stated:

> "...To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court."

Similar concerns caused this Court to reverse petitioners' convictions in Russell v. United States, supra, on the ground that the indictments that had been returned against the petitioners failed to apprise them with sufficient particularity of the charges against which they were required to defend. At 369 U.S. 766, this Court stated:

> "...A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. The Court has had occasion before now to condemn just such a practice in a quite different factual setting. Cole v. Arkansas, 333 U.S. 196, 201-202, 68 S.Ct. 514, 517, 92 L.Ed. 644." (Emphasis added).

The instant case is of the same kind. The court of appeals, by its affirmance, and the Ohio Supreme Court, by its refusal to hear the petitioner's appeal, excused the State's failure to prove a material allegation of the indictment, which the trial court identified to the jury as an essential element of the crime charged, by altering the charge brought against the petitioner after the verdict had already been returned. As Judge Jackson of the court of appeals noted in his dissenting opinion, "In circumstances such as these, where the State failed to give the accused proper notice of what it did ultimately

prove, and failed to prove what it gave the accused notice of,...Constitutional provisions of this state and the nation require reversal."[10] (See App. 45).

Moreover, as the petitioner argued in the court of appeals and in the Ohio Supreme Court, the prejudicial effect of the constitutional error committed by the lower courts was not confined merely to the Theft in Office charge; that error tainted the petitioner's conviction of Intimidation as well, because of the close connection between the two charges.

The petitioner's Intimidation conviction was based on a meeting which took place on August 2, 1975 (Tr. 114). During the course of that meeting, the petitioner allegedly asked Deputy Trainee Campbell to relinquish certain notes that Campbell had been keeping (Tr. 116). When Campbell refused to give up those notes, the petitioner allegedly threatened him (Tr. 119).

---

[10] The affirmance of petitioner's conviction in this fashion also implicates Double Jeopardy concerns. In order to satisfy constitutional requirements, a charging instrument must be sufficiently definite to demonstrate with accuracy the extent to which an accused may plead a former acquittal or conviction in the event any proceedings are later instituted against the accused for a similar offense. Russell v. United States, supra. When an appellate court alters the elements of the charge after conviction, however, the original charging instrument no longer fulfills this constitutional mandate, and the accused may well be exposed to jeopardy again.

It was that threat which formed the basis of petitioner's conviction for Intimidation, and it was what Campbell's notes supposedly contained that prompted the petitioner to level that threat. The notes Campbell had been keeping concerned irregularities he had observed in Division 4, including the removal by petitioner from Division 4 of the two pearl-handled firearms on April 19, 1975 (See Tr. 187, 111, 117).

Thus, the close connection between the petitioner's conviction of Theft in Office and his conviction of Intimidation is apparent. The petitioner's alleged conduct in committing Theft in Office in Campbell's presence gave the petitioner a reason and motive for allegedly threatening Campbell when Campbell demonstrated an intention to use the notes he had allegedly made of the theft against the petitioner. Remove that reason and motive, however, and a different result would in all likelihood obtain with respect to the Intimidation charge.

As a consequence, any constitutional error committed by the courts below with respect to the Theft in Office charge was prejudicial to the petitioner on the Intimidation charge as well. At the very least, it cannot be concluded that such errors were harmless with respect to the Intimidation conviction beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

An important constitutional question which was probably wrongly decided by the lower courts is presented by this petition concerning the right of an accused not to have the charge brought against him altered after verdict by a state appellate court which is asked to review his conviction. The petitioner, therefore, urges this Court to review his two convictions on certiorari.

II.

An Important Question, Decided By The Lower Courts In A Way Probably Not In Accord With Applicable Decisions Of This Court, Is Presented Concerning The Constitutional Validity, Under the Sixth and Fourteenth Amendments, Of The Action Of A State Appellate Court In Affirming A Criminal Conviction On The Basis Of An Entirely Different Theory Of The Case From That Which The State Advanced In The Trial Court To Secure The Conviction.

Donald Campbell, the only witness who testified that the petitioner carried two pearl-handled firearms out of the fourth-floor office of Division 4, stated that the guns were in plastic bags when he observed them in Division 4 on April 19, 1975 (Tr. 29). He further testified that inside the bags along with the guns were tags which had markings on them (Tr. 29). Over defense objection, the following testimony was elicited from Campbell:

> "Q. Was there any address noted on the markings of the evidence bag?
>
> "A. 10001 Cedar Avenue." (Tr. 29).

This testimony was extremely vital, as it was by far the most important testimony in the entire case on the issue of whether or not the pearl-handled guns had been seized by the Sheriff's Department at the Cedar Avenue raid.

In his initial brief in the court of appeals, the petitioner argued that the admission of this hearsay testimony had been prejudicial error, requiring a reversal of his convictions. In that court, two of the three judges who sat on the panel which heard this case agreed that Campbell's testimony constituted inadmissible hearsay which should have been excluded by the trial court. Only Judge Jackson, who dissented, however, found the error to be prejudicial (See App. 45-54). Judge Corrigan, who cast the deciding vote, agreed, in his concurring opinion, that error had been committed, but concluded that it was harmless error (See App. 23-24). Judge Corrigan's finding of harmless error was based upon his determination that the error was not of constitutional dimension and upon his agreement with the opinion of the court that it had been unnecessary for the State to link the pearl-handled guns to the Cedar raid (See App. 24). In his application for reconsideration in the court of appeals and in his memorandum in support of jurisdiction in the Ohio Supreme Court, the petitioner noted that the State's entire theory of the case had always been that the guns the petitioner allegedly had pilfered were two pearl-handled guns seized at the Cedar raid. The petitioner argued that by affirming his conviction on the entirely new theory that the State had been under no obligation to connect the guns to the Cedar raid, the court of appeals had deprived him of his constitutional rights to be informed of the charge against him and to due process. (See App. 114-119, 99-105). The petitioner renews that argument here.

Until the court of appeals announced its initial decision in this case on February 28, 1978, the petitioner had every legitimate reason to believe that his convictions could be upheld only if there was sufficient competent evidence in the record to show that the State had fulfilled the promises it had made to the jury in its opening statement that it would prove the following facts in support of its theory of the case beyond a reasonable doubt:

* * *

"The evidence will show that at this time an alternate site for a raid was decided upon, and that being 10001 Cedar Avenue in the City of Cleveland. There was a -- no, there was not a search warrant for this particular address, but it was an alternate site for a raid on this particular occasion.

"The evidence will show that Major Payne, the defendant, and other employees of the Sheriff's Department did go out in the early morning hours of April 19th and did raid this establishment, and made several arrests and seized many items of evidence, such as gambling paraphernalia, money, liquor, and some weapons.

"The evidence will show, ladies and gentlemen, that seized at this particular address were six handguns and one shotgun, a long one.

"The evidence will further show, ladies and gentlemen, that the items that were seized from that address were brought back by the Sheriff's personnel to the property room area of Division 4, the fourth floor of County Jail, where it was to be inventoried and entered into the property room to be held pending any court case.

"The evidence will further reflect, ladies and gentlemen, that on this occasion in the early morning hours of April 19, 1975, the defendant in this case, Major Payne, requested of Detective Garner, who is an employee and along on the raid at the time, made a request for two 9-millimeter Browning firearms that had been seized at the raid on Cedar and were in the property room of Division 4 and as yet to be inventoried, and this request was made for these firearms for his own use.

"The evidence will further show that these two firearms were taken by Major Payne and he left the building with these two pistols.

"The evidence, ladies and gentlemen of the jury, will further reflect that the search warrant return that was filed and the inventory that was filed with the court and the property book

that is filed and kept as a matter of record by the Sheriff's Department indicate that on this particular night in question, at this particular raid, there are entries for four handguns and one shotgun.

"The evidence will further show, ladies and gentlemen, that there is no entry made for the two 9-millimeter pistols, the Browning firearms, either on the inventory that was filed as a result of this raid or they do not appear in the evidence book kept by the Sheriff's Department."

* * *

"We, the State of Ohio, have the burden of proof and we accept that burden."

* * *

"We will further prove to you beyond a reasonable doubt that on or about April 19, 1975, in the County of Cuyahoga, Major Edward Payne unlawfully and purposely, while being a public official, used his office in the aid of committing a theft offense; that he knowingly and purposely obtained for his own use two 9-millimeter firearms with pearl handles on same from property lawfully seized by and in the possession of the Cuyahoga County Sheriff's Department." (State's opening statement, Tr. 11-13; Tr. 19-20)(Emphasis added).

When the court of appeals rendered its decision, however, the petitioner was informed that he had been sadly mistaken. That court upheld his conviction based on its determination that it had been altogether unnecessary for the State to prove that the pearl-handled firearms had been seized at the Cedar raid. By ruling that it was wholly unnecessary for the State to prove that the guns had been seized at the Cedar raid, and by ruling that it was wholly unnecessary for the State to prove that the seizure of those guns had been lawful and, indeed, by effectively ruling that the State was not even required to prove that the guns had come into possession of the Sheriff's Department by means of a seizure at all, the court of appeals affirmed the petitioner's convictions on the basis of an entirely different theory of the case from that upon which the State relied in the trial court to secure the conviction.

Indeed, the issue of whether or not two pearl-handled guns had been seized at the Cedar raid was one of the most hotly contested issues in the entire trial. The State devoted a major part of its trial effort to an attempt to prove that two pearl-handled guns had been seized at Cedar. The major thrust of the defense at trial was that no pearl handled firearms had ever been seized at the Cedar raid, and that the pearl-handled guns were nothing more than the creation of a biased, bitter and uncorroborated Donald Campbell.

The petitioner submits that, in the face of such a record, the court of appeals' determination that it had been unnecessary for the State to prove to the jury its entire theory of the case and its affirmance of petitioner's convictions based

on an entirely new theory of the case, a theory of which the petitioner had never previously been apprised, deprived him of his constitutional rights to be informed of the specific charge against him and to due process of law. Just as the petitioners in Cole v. Arkansas, 333 U.S. 196 (1948), the petitioner here was entitled, as a matter of due process of law, "...to have the validity of [his] convictions apprised on consideration of the case as it was tried and as the issues were determined in the trial court." Id., at 333 U.S. 202. The petitioner had a constitutional right to be afforded notice of the charge against him in terms sufficiently inelastic to preclude his conviction from resting on one point while the affirmance of that conviction rested on another. Russell v. United States, 369 U.S. 749, 766 (1962).

The decisions of the lower appellate courts deprived the petitioner of those rights, however. As a result, not only is the petitioner's conviction of Theft in Office tainted by constitutional error, but the petitioner's closely connected conviction of Intimidation is so tainted as well. Accordingly, petitioner urges this Court to review this substantial constitutional question on certiorari.

III.

An Important Question, Decided By The Lower Courts In A Way Probably Not In Accord With Applicable Decisions Of This Court, Is Presented Concerning The Right Of An Accused, Under The Sixth And Fourteenth Amendments, To Confront The Witness Against Him.

As previously noted, two of the three judges who heard this case in the court of appeals agreed with the petitioner's

contention that Campbell's oral testimony that the address 10001 Cedar Ave. was written on the tags he observed in the plastic bags containing the pearl-handled guns should have been excluded by the trial court. The petitioner's conviction was, nevertheless, affirmed on the basis of concurring Judge Corrigan's conclusion that the error was harmless. This conclusion was based, in part, upon his determination that the erroneous admission of Campbell's hearsay testimony was not an error of constitutional proportion, a determination which permitted him to apply a less exacting standard of review in assessing the prejudicial effect of the admission of that testimony (See App. 24). In his application for reconsideration in the court of appeals and in his memorandum in support of jurisdiction in the Ohio Supreme Court, the petitioner argued that, under the circumstances of this case, the admission of Campbell's hearsay testimony was, indeed, error of constitutional dimension, in that it deprived the petitioner of his Sixth and Fourteenth Amendment right to confront the witnesses against him (See App. 111-114, 90-98.

At the core of the protection afforded by the Confrontation Clause of the Sixth Amendment, made applicable to the states by way of the Due Process Clause of the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400 (1965), is the guarantee that the accused will be afforded the opportunity to cross-examine the witnesses against him face to face in front of the jury chosen to pass upon his innocence or guilt. Barber v. Page, 390 U.S. 719 (1968); Bruton v. United States, 391 U.S. 123 (1968); Pointer v. Texas, supra. As this Court stated in California v. Green, 399 U.S. 149 at 161 (1970):

"...We note that none of our decisions interpreting the Confrontation Clause requires excluding the out-of-court statements of a witness who is available and testifying at trial. The concern of most of our cases has been focused on precisely the opposite situation - situations where statements have been admitted in the absence of the declarant and without any chance to cross-examine him at trial...." (Emphasis added).

In the instant case, Donald Campbell was permitted to testify, over objection, as to an out-of-court written statement, made by an unidentified declarant, to the effect that the pearl-handled firearms had come from the Cedar raid. Because the petitioner never had the opportunity to confront and cross-examine the author of that crucial out-of-court written statement, the trial court's error in allowing that hearsay testimony to be heard and considered by the jury was error of constitutional proportion under the Sixth and Fourteenth Amendments.

Because of the importance of linking the pearl-handled guns to the Cedar raid, see, supra, at 9-12, the admission of Campbell's oral testimony, in derogation of the Confrontation Clause, was extremely prejudicial with respect to the charge of Theft in Office. Furthermore, because of the previously noted close connection between the Theft in Office charge and the Intimidation charge, the error was prejudicial as to the Intimidation charge as well. See Chapman v. California, 386 U.S. 18 (1967).

Accordingly, this Court ought to review the petitioner's convictions because of the petitioner's serious constitutional claim under the Confrontation Clause which was rejected by the court of appeals and by the Ohio Supreme Court.

CONCLUSION

A careful reading of the thorough, cogent and persuasive dissenting opinion delivered by Judge Jackson of the court of appeals in this case (see App. 28-83) demonstrates clearly both the injustice suffered by petitioner in the lower courts and the substantiality of the constitutional questions presented by this petition. Accordingly, petitioner respectfully urges this Court to grant the writ of certiorari and accept this case for review.

Respectfully submitted,

BERNARD A. BERKMAN
BERKMAN, GORDON, KANCELBAUM and LEVY
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245

JAMES R. WILLIS
Bond Court Building
Cleveland, Ohio 44114
(216) 523-1100

Attorneys for Petitioner

December, 1978

Supreme Court, U. S.
FILED
DEC 5 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-900

MAJOR EDWARD PAYNE,

Petitioner,

VS.

STATE OF OHIO,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

BERNARD A. BERKMAN
BERKMAN, GORDON, KANCELBAUM AND LEVY
2121 THE ILLUMINATING BUILDING
55 PUBLIC SQUARE
CLEVELAND, OHIO 44113
(216) 781-5245

JAMES R. WILLIS
BOND COURT BUILDING
CLEVELAND, OHIO 44114
(216) 523-1100

Attorneys for Petitioner

BROWNPRINT INC. — LEGAL DIVISION, CLEVELAND, OHIO 44113 (216) 621-2944

TABLE OF CONTENTS

	Page
Order of the Ohio Supreme Court Denying Motion for Rehearing	1
Order of the Ohio Supreme Court Dismissing Petitioner's Appeal of Right	2
Order of the Ohio Supreme Court Overruling Petitioner's Motion for Leave to Appeal	3
Order of the Court of Appeals, Eighth Appellate District, Cuyahoga County, Ohio, Overruling Petitioner's Motion for Reconsideration	4
Journal Entry of the Court of Appeals, Eighth Appellate District, Cuyahoga County, Ohio, Affirming Petitioner's Convictions	5
Opinion of the Court, by Judge Patton	5
Concurring Opinion of Judge Corrigan	23
Dissenting Opinion of Judge Jackson	28
Excerpt from Petitioner's Memorandum in Support of Jurisdiction, filed in the Ohio Supreme Court	84

TABLE OF CONTENTS (CONT.)

	Page
Excerpt from Petitioner's Memorandum in Support of Application for Reconsideration, filed in the Court of Appeals, Eighth Appellate District, Cuyahoga County, Ohio	110

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,)
)
City of Columbus.)

1978 Term

To wit: September 7, 1978

State of Ohio,)
Appellee,)
)
vs.)
)
Major Edward Payne,)
Appellant.)

No. 78-617

REHEARING

It is ordered by the court that rehearing in this case is denied.

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,)
)
City of Columbus.)

1978 Term

To wit: July 6, 1978

State of Ohio,)
Appellee,)
)
vs.)
)
Major Edward Payne,)
Appellant.)

No. 78-617

APPEAL FROM THE COURT OF APPEALS

for Cuyahoga County

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,) 1978 Term
)
City of Columbus.) To wit: July 6, 1978

State of Ohio,) No. 78-617
Appellee,)
) MOTION FOR LEAVE TO
vs.) APPEAL FROM THE
) COURT OF APPEALS
Major Edward Payne,)
Appellant.) for Cuyahoga County

It is ordered by the Court that this motion is overruled.

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

GERALD E. FUERST, CLERK OF COURTS

State of Ohio

APPELLEE

-vs-

Edward Payne

APPELLANT

COURT OF APPEALS
NO. 36457

LOWER COURT NO.
C.P. 22923 Cr.

MOTION NO. 39724

DATE March 21, 1978

JOURNAL ENTRY

Motion by appellant for reconsideration overruled. Exc.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 36457

STATE OF OHIO

Appellee

-vs-

EDWARD M. PAYNE

Appellant

APPEAL FROM
COMMON PLEAS COURT
No. 22923-Cr.

JOURNAL ENTRY
AND OPINION

DATE: Feb. 28, 1978

PATTON, J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

The Grand Jury of Cuyahoga County indicted the defendant-appellant, Major Edward Payne, on two counts of intimidation, Ohio Revised Code Section 2921.03, and two counts of theft in office, Section 2921.41. The State alleged that the defendant had intimidated deputies Donald W. Campbell and Phillip Vari, and that on separate occasions, the defendant had stolen $250.00 in cash and two pearl-handled pistols from the Sheriff's Office of Cuyahoga County.

At trial, a judgment of acquittal was entered at the close of the State's case on the count of intimidation of Phillip Vari. The jury returned a verdict of not guilty on the count of theft in office of $250.00 and a guilty verdict on the counts of theft of the pearl-handled pistols and the intimidation of Donald Campbell. The trial court imposed concurrent sentences of two to ten years and three to ten years. The defendant-appellant is properly before this court seeking a reversal of his convictions.

The record from the trial court reveals the evidence pertinent to this appeal: The appellant, Major Payne, was the warden of the Cuyahoga County Jail and the head of Division 4 of the Sheriff's Department. The latter division is an undercover unit established for the purpose of discovering individuals wanted on county capiases at various illegal "cheat spots". The case revolves around the operations of Division 4 and the activities of Major Payne and the personnel under his supervision in the spring and summer of 1975.

At the trial, the State's chief witness, former deputy-trainee, Donald W. Campbell, testified to the following facts: On April 19, 1975, he had participated in the planning and initial steps of a Division 4 raid on a west side "cheat spot", which was subsequently cancelled. Upon returning to Division 4 headquarters, he worked on his reports while other deputies under the supervision of the defendant left for a raid upon a Cedar Avenue location. He further testified that later that morning, the defendant and his deputies returned to Division 4's offices with evidence seized in the raid.

Campbell stated that among the weapons he observed were two 9-millimeter handguns with pearl handles packaged in plastic evidence bags. When questioned as to the address on the tags of the evidence bag, he answered over objection: "10001 Cedar Avenue". He then testified that the defendant, Major Payne, indicated to a Detective Garner that he (the defendant) wanted the 9-millimeter weapons. Whereupon, Detective Garner retrieved the pearl-handled pistols from the evidence bags and placed them in a brown paper bag. Campbell then stated that the defendant left the office with the brown paper bag. Through Campbell, the State also established the fact that these pistols were not recorded in the property book, along with other items seized in the raid.

The State's chief witness also gave testimony as to subsequent events. Campbell explained how he was seriously injured while on an undercover operation and was therefore placed on extensive disability. According to him, officers from the Sheriff's Department made a series of visits to his home during his convalescence period regarding copies of reports that he possessed relevant to the activities of Major Payne and to irregularities which he had observed in the Sheriff's Office.

Campbell then testified that the defendant invited him, his wife, and Phillip Vari to the Eastown Motel for the evening of August 2, 1975. Upon arriving at the motel, the three went into the lounge and had drinks and conversation with the defendant. Though the tone of the conversation was friendly at first, Campbell stated that the defendant began to focus on a more serious topic. A series

of questions was directed at the nature and content of the information that Campbell had in his possession. When Campbell refused to turn the information over to Major Payne, the defendant allegedly remarked: "If you don't cooperate with me, I'll make sure you never get to court." Campbell's inquiry as to the meaning of the statement led to the reply: "Don't cooperate with me and you'll find out." Campbell then testified that his wife had become irritated by the comments and insisted that they leave. Whereupon, the three got up and proceeded to leave the lounge. On the way out, they met Marion Koszewski, also with the Sheriff's Department, as he entered the lounge.

Campbell concluded his testimony by stating that he was on extensive disability on August 2, 1975 and that he was fired by Sheriff Kreiger on December 15, 1975.

The State's second major witness, Sims Goodman, Jr., had served as an informant for several law enforcement agencies, including the Sheriff's Department. His testimony revealed that on April 19, 1975, he was in the area of the Cedar Avenue raid and was in a position to see certain aspects of the raid. He stated that he observed two "high rollers" (gamblers) named Van Lapsley and "Big Jordan" coming from the address where the raid had taken place. Goodman then testified that prior to that night, while working as a "door shaker" at Goldie's Lounge, he had taken pistols of both men on separate occasions when they entered the lounge. He described their weapons as 9-millimeter pistols with snow-white grips. Goodman also testified that several days after the raid, he again had occasion to shake both men down and

found that they possessed pistols with dark handles. On cross-examination, Sims testified that on the evening subsequent to the raid when he shook Lapsley down, the latter stated in reference to his pistol, "Some bright nigger got it." Sims also divulged that "Big Jordan" had told him "That nigger Payne got my gun."

The State also called Judith Campbell and Phillip Vari, whose testimony, pertinent to this appeal, corroborated the statements of Donald Campbell regarding the evening with the defendant at the Eastown Motel. The final witness for the prosecution, James Marino, a reporter for the Cleveland Press, testified that Major Payne had told him after the raid that six handguns had been seized. Marino's article reporting that information was also admitted into evidence.

The defendant called a number of witnesses who directly and indirectly contradicted the testimony of the prosecution's witnesses. Most significant was the testimony of Deputy Garner, who stated that he did not give Major Payne the pearl-handled pistols, nor did he even see Major Payne or Donald Campbell at Division 4 after the raid of April 19th. He also testified that every item seized in the raid was entered in the property book. Garner also testified, as did Deputy Burress and Powell Caesar, that he did not see any pearl-handled pistols at the Cedar Avenue address. Moreover, Deputy Thornton and Powell Caesar stated that only four handguns were seized in the raid.

Further contradiction was provided through the testimony of Lee Jordan and Ivan Lapsley. Each of these witnesses

denied owning 9-millimeter pistols with white handles. Both men also testified that they had not seen one another in over a year.

There was also conflicting testimony as to the presence of Payne and Campbell at Division 4 after the April 19th raid. Campbell testified that he and Payne were at the offices until about 7:30 a.m. Deputies Bly and Thornton testified that they did not see either Payne or Campbell, but they both indicated that they had only entered the offices at 7:30 a.m. Deputy Brown stated that Campbell was at the office when he returned from the raid, and Deputy Burress testified that Campbell was in the parking lot at 7:00 or 7:30 a.m. Both Koszewski and Garner testified that they did not see Major Payne in the offices of Division 4 after the raid.

Defense witnesses also contradicted Campbell regarding the reason for visits to his home by members of the Sheriff's Office during his convalescence. While he had indicated that the purpose of the visits was to question him regarding his information on Major Payne's activities both Deputy Brown and Deputy Koszewski testified that the visits were in regard to certain statements and reports that he had submitted to the Sheriff's Office.

One final area of conflicting evidence centered on the evening at the Eastown Motel. Defense witness Keldon Casey testified that he was with the defendant and the Campbell party the entire evening, and the conversation did not turn into a heated argument. However, when Mrs. Campbell was called as a rebuttal witness, she denied his presence at the table and

contradicted his description of her as having blonde hair with a photograph taken that evening showing her with brown hair. Finally, Deputy Koszewski testified that when he entered the Eastown lounge as the Campbell party was leaving, they appeared to be laughing, and Campbell had his arm around the Major.

On appeal to this court, the appellant assigns the following errors:

"I. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE THEFT IN OFFICE CHARGE MADE BOTH AT THE CLOSE OF THE STATE'S CASE AND AT THE CLOSE OF THE ENTIRE CASE.

"A. The Prosecution Failed To Prove, By Competent Evidence, That The Firearms Supposedly Taken By The Appellant Had Been Seized By, And Therefore Belonged To, The Sheriff's Department.

"B. As A Matter Of Law, The State Failed To Meet The Burden It Accepted Of Proving That The Seizure Of The Pearl-Handled Guns By The Sheriff's Department Was Lawful.

"C. As A Matter Of Law, The Appellant Did Not Commit A Theft Offense, Because The Sheriff's Department Is Not An 'Owner' Within The Meaning Of Revised Code Section 2913.02.

"II. THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S OBJECTION TO DONALD CAMPBELL'S TESTIMONY CONCERNING THE CONTENTS OF A WRITING WHICH LINKED THE FIREARMS TO THE CEDAR RAID.

"III. THE VERDICT WHICH FOUND THE APPELLANT GUILTY OF THEFT IN OFFICE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

"IV. A REVERSAL OF THE APPELLANT'S CONVICTION FOR THEFT IN OFFICE NECESSITATES A REVERSAL OF THE APPELLANT'S CONVICTION FOR INTIMIDATION AS WELL.

"V. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL ON THE INTIMIDATION CHARGE MADE BOTH AT THE CLOSE OF THE STATE'S CASE AND AT THE CLOSE OF THE ENTIRE CASE.

"A. As A Matter Of Law There Was No Intimidation Of Campbell In The Discharge Of His Duty Because On August 2, 1975 Campbell Was On Extensive Disability And Had No Duties.

"B. Assuming, Arguendo, That Campbell Was Charged With The Duties Of A Deputy Sheriff On August 2, 1975, The Intimidation Was Unrelated To Those Duties."

Assignment of Error 1

The appellant maintains that the trial court should have granted his motion for acquittal as to the theft of the pistols for three reasons. First, he argues that the prosecution failed to prove that the pearl-handled pistols belonged to the Sheriff's Department. Secondly, he contends that the State failed to prove the weapons were legally seized and argues that the State was required to prove the legality of the seizure because it failed to object to the jury instructions regarding the elements of the crime. The third reason basically states that a theft offense was not committed because the Sheriff's Department is not an "owner" within the meaning of Ohio Revised Code Section 2913.02. This court holds that the first assignment of error does not constitute grounds for a reversal.

Appellant's first reason states that the prosecution failed to prove an essential element of the crime, specifically, the element regarding ownership of the pistols. Appellant contends that the State needed to prove that the pistols were seized in the raid at 10001 Cedar Avenue and therefore belonged to the Sheriff's Department. This position imposes a higher burden on the State than is required by law.

To warrant a conviction for theft in office, Section 2921.41, the State must prove that a theft offense was committed. Therefore, attention is drawn to Ohio Revised Code Section 2913.02, which reads in pertinent part:

> "§2913.02 Theft.
> "(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either:
> "(1) Without the consent of the owner or person authorized to give consent;
> "(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;...."

The key word for the purpose here is "owner", which is defined in Section 2913.01(D) as:

> "(D) 'Owner' means any person, other than the actor, who is the owner of, or who has possession or control of, or any license or interest in property or services, even though such ownership, possession, control, license, or interest is unlawful."

From this language, the court finds that the element of ownership which the State needed to prove consists of possession in one other than the accused. See State v. Shoemaker (1917), 96 Ohio St. 570.

This court further finds that the State produced sufficient evidence to prove this element beyond a reasonable doubt. Though a discussion of the sufficiency of that evidence will follow in the consideration of the third assignment of error, the court will address certain points raised in the appellant's brief at this point. The appellant relies on State v.

Kulig (1974), 37 Ohio St. 2d 157. However, in the instant case, there was direct evidence to establish the element of ownership, and the rule in Kulig applies where there is only circumstantial evidence to prove the element.[1] For that same reason, the reliance on State v. Farmer (1951), 156 Ohio St. 214, does not apply.

The second reason supporting this assignment of error also lacks merit. It attempts to utilize Rule 30 of the Ohio Rules of Criminal Procedure as a means of adding elements to a crime defined by statute.

The rule reads in pertinent part:

> "...A party may not assign as error the giving or failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection...."

Based upon this language, it is appellant's contention that since the prosecution did not object to a jury instruction that defined the crime as the theft of property lawfully seized, the prosecution had to prove that the pistols were, in fact, lawfully seized. This conclusion is not in

1/ The rule in Kulig reads:

> "It is settled that where circumstantial evidence alone is relied upon to prove an element essential to a finding of guilt, it must be consistent only with the theory of guilt and irreconcilable with any reasonable theory of innocence." State v. Kulig, supra at 160. (Emphasis added)

accord with the purpose of Rule 30. The rule only provides that if a party fails to object to a jury instruction, he may not raise the error on appeal. The rule does not provide an additional sanction of adding elements to the offense at issue. Furthermore, defining crimes and criminal procedure is within the province of the legislature and not the courts. See State v. Poffenbaugh (1968), 14 Ohio App. 2d 59, 65-66.

The final reason given in support of this assignment is that a theft offense was not committed because the Sheriff's Department is not an "owner" within the meaning of Section 2913.02. This contention is based on the fact that the definition of "owner"[2] is limited to a "person", and the definition of "person" as defined in Ohio Revised Code Section 1.59 does not include the Sheriff's Department.

This argument fails when the focus is shifted from the Sheriff's Department to the Sheriff. The Sheriff is a "person" within the meaning of Section 1.59. Moreover, the statutory provisions pertaining to the office of Sheriff provide that he is personally responsible for property in his possession.[3] This court finds that since the pistols in question were in the possession of the deputies, the Sheriff's

2/ The definition of "owner" as found in Ohio Revised Code Section 2913.01(D) is set forth on page 8 of this entry.

3/ Ohio Revised Code Section 311.02 requires the Sheriff to post bond, and Section 311.15 requires him to deliver all chattels in his possession to his successor.

agents,[4] they were constructively in the possession of the Sheriff.[5] Therefore, as a matter of law, there was a "person" who had been deprived of property in his possession.[6]

Assignment of Error II

The second assignment of error states that the trial court erred in admitting Donald Campbell's testimony as to the address on the tag of the evidence bag. This court finds that it was not error

4/ See State ex rel. Geyer v. Griffin (1946), 80 Ohio App. 447.

5/ See Hicks v. Grussel (1901), 8 Ohio N.P. 195, which held that property taken under a writ of attachment and placed in the possession of a keeper was property in the Sheriff's possession.

6/ This court also notes that Ohio Revised Code Section 2921.41, pertaining to theft in office, contemplates property taken from a department or agency of a subdivision of the State.

"§2921.41 Theft in office.

"(A) No public official or party official shall commit any theft offense, when either of the following applies:

* * *

"(2) The property or service involved is owned by this or any other state or the United States, a municipality, or any political subdivision, department, or agency of any of them, or by a political party, or is part of a political campaign fund...."

to permit Campbell to testify as to the address on the tag.

The State did not need to prove that the pearl-handled pistols were seized in the raid at Cedar Avenue in order to show that they were in the possession of the Sheriff. However, the address did have corroborative value as circumstantial evidence, and therefore, the fact that Campbell's statement violated neither the hearsay nor best evidence rules is significant.

The statement was not hearsay evidence in that it was descriptive of what the witness observed and only circumstantial as to the source of the pistols. In this regard, two cases were considered. First, the Ninth Circuit of the United States Court of Appeals held in the case of United States v. Snow (1975), 517 F.2d 441, that a tape, bearing the name of the defendant, affixed to a case containing a weapon was not hearsay and was properly admitted to show that defendant knowingly possessed the weapon. Secondly, the Supreme Court of Louisiana held in the case of State v. Jackson (1953), 223 La. 435, 65 So. 2d 903, that the testimony of a coroner that he performed an autopsy on a body that bore a tag with the victim's name was not hearsay and was relevant proof of the corpus delicti. In its opinion, the Jackson court stated the following:

> "It is obvious that the tag placed on the body containing the name Frances Foster, was placed there to identify it from any other female body then in the morgue.... At no time did the autopsy surgeon ever

say he identified this body as that of Frances Foster...."

Likewise, in this case, the tag was placed on the evidence bag so as to identify the pistols from any other weapons in the property room. Indeed, Deputy Bly testified that it was the custom of the Sheriff's Office to place one of the tags, marked with the location from which the item was taken, on each evidence bag.

As for the objection that the testimony violated the best evidence rule, this court classifies the tag with the address on it as an "inscribed chattel".[7] This classification is based on the fact that the item is both a chattel and a writing. Therefore, in accordance with the authorities on the subject,[8] this court finds that it was within the discretion of the trial court to determine whether the witness' testimony could be substituted for the inscribed chattel, itself. In that the inscription on the tag was simple and the witness had ample opportunity to observe it, this court finds that the trial judge did not abuse his discretion in admitting the statement. The opinion of the Fifth Circuit of the United States Court of Appeals in the case of United States v. Duffy (1972), 454 F.2d 809, is persuasive on this issue. In that case, the court found that the testimony of a witness relating his observation of a shirt, with the defendant's initials,

7/ McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §232, at 562 (2d Ed. 1972).

8/ Id. See also 4 WIGMORE, EVIDENCE §1182, at 421 (Chadbourn Rev. 1972).

"D-U-I", marked on it, did not violate the best evidence rule.

Assignment of Error III

The appellant argues that the guilty verdict on the charge of theft in office of the two pistols is against the manifest weight of the evidence. This assignment of error is not well taken. Though there was conflicting evidence, the evidence on the whole was sufficient to support the guilty verdict.

The argument that the verdict is against the manifest weight of the evidence focuses on the issue of whether or not a theft offense was proven by the State. As stated previously, appellant maintains that the State failed to prove the essential element of ownership, or as this entry has described it, possession in one other than the accused.

The State offered proof of that element through the testimony of Donald Campbell and the corroborating testimony of Sims Goodman. Campbell did testify that he saw the defendant and other deputies leave Division 4 for a raid and then return that same morning. He also testified that, among the evidence the deputies brought in, he observed the 9-millimeter pistols with pearl handles in plastic evidence bags with tags attached. This testimony was direct evidence, and it was sufficient to prove that the pistols were in the possession of one other than the accused. This is especially true when one considers the testimony of Deputy Bly relative to the Sheriff's Department's regular procedure in tagging and bagging

seized items. The State did prove that the pistols in question were in the possession of the Sheriff of Cuyahoga County.

Though portions of Sims Goodman's testimony were circumstantial evidence, it did corroborate Campbell's allegation that the defendant committed a theft offense. Therefore, on the basis of a careful review of the evidence, this court finds that the verdict was not against the manifest weight of the evidence.

Assignment of Error IV

In that this court has found that the defendant-appellant was properly convicted on the count of theft in office, there is no basis for appellant's argument that a reversal on that count mandates a reversal of his conviction for intimidation. Moreover, even if this court found error in the conviction for theft in office, it does not follow that a reversal on the count of intimidation is required. Therefore, this assignment of error is not well taken.

Assignment of Error V

The final assignment of error is that the trial court erred in denying appellant's motions for acquittal on the charge of intimidation. Appellant supports this assignment with two reasons.

The first reason is that Campbell had no duties on August 2, 1975. Though Campbell was on extensive disability at that time, he was still employed as a deputy-trainee in the Sheriff's Office.

Moreover, though he was not on active duty, performing his regular functions, he was under an obligation to fulfill the duties implicit in the nature of his office.

Since the Sheriff is the chief law enforcement officer of the county,[9] and since a deputy is the Sheriff's agent and occupies a single office with him,[10] a deputy has an implicit duty to see that the law is upheld. Therefore, this court finds that Donald Campbell did have a duty to report any illegalities that he observed by virtue of his office.

Appellant's second reason in support of this assignment is that the alleged intimidation was unrelated to Campbell's duties. However, as stated above, Campbell had a duty to report any irregularities which he observed. Therefore, when Major Payne threatened Campbell in regard to taking the information to court, that constituted intimidating a public servant in the discharge of his duty. Thus, appellant's second reason in support of this assignment also fails. For these reasons, this court holds that the appellant's final assignment of error is without merit.

For all the foregoing reasons, we overrule appellant's assignments of error and affirm the judgment of the trial court.

9/ See In Re Sulzmann (1932), 125 Ohio St. 594.

10/See State ex rel. Geyer v. Griffin, supra n. 4.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 36457

STATE OF OHIO — APPEAL FROM COMMON PLEAS COURT
Appellee — No. 22923-CR

-vs-

EDWARD PAYNE — JOURNAL ENTRY CONCURRING OPINION
Appellant

DATE: Feb. 28, 1978

CORRIGAN, P.J., CONCURRING:

While concurring in the affirmance of the judgment and most of the opinion of Judge Patton, I differ with his conclusion on the second assignment of error and express my own views on that assignment. Further I would amplify on the reasons advanced for finding the third assignment to be without merit.

As his second assignment of error, the defendant claims that the statement of Campbell of the address of the evidence tags was hearsay. The witness testified that the guns were tagged as evidence and that the address "10001 Cedar Avenue" was written on the tags. A statement is regarded as hearsay when it is made by a person not under oath or subject to cross-examination and the statement is offered to prove the truth of the matter asserted, Potter v. Baker (1955), 162 Ohio St. 488, 494.

The purpose of Campbell's testimony in this instance was to show that the handguns were seized in the raid. Because the tags were written by someone other than Campbell, not under oath or subject to cross-examination, the statement by Campbell was hearsay. Accordingly, the objection to its admission should have been sustained by the court.

Criminal Rule 52(A) states that any error which does not affect a substantial right of the defendant is harmless error, and therefore, should be disregarded. In State v. Davis (1975), 44 Ohio App. 2d 335, this court held that when the error by the trial court is non-constitutional in nature, the conviction should be affirmed if, disregarding the objectionable evidence, there is substantial evidence to support the conviction. It must be noted that the source of the handguns is not important to the disposition of this case, so long as the State proves that the Sheriff's Department had possession. The address on the tags, merely went to show where the handguns came from. The statement that the weapons were tagged as evidence, irrespective of what the tags stated, was competent evidence to show possession by the Sheriff's Department. Thus, disregarding the hearsay evidence does not reduce the degree of evidence introduced to show possession. Therefore, the admission of the hearsay evidence was harmless error and did not substantially affect the rights of the defendant.

The defendant contends as his third assignment of error that the conviction of theft in office was against the manifest weight of the evidence. This assignment of error also lacks merit. The defendant

bases his argument on the fact that the State failed to prove by competent evidence that the pearl-handled firearms were seized at the 10001 Cedar Avenue raid. As has already been shown, this fact is not essential to the State's case.

The requisite elements of the charge of theft in office are:

1) That the defendant as a public official.

   A) Used his office to commit the offense; or

   B) Took property owned by the State or a political sub-division therein;

2) With the purpose to deprive the owner of the property;

3) Knowingly obtained or exerted control over the property.

4) Without the consent of the owner.

From the facts contained in the record there is no dispute that the defendant was a public official and that he obtained and exerted control over the property in question. The record also shows that the defendant came in contact with the property by virtue of his position in the Sheriff's Office.

R.C. §2901.22(A) states that a person acts purposely when it is his specific intention to either cause a certain result by his conduct or engage in a specific course of conduct. In the present case the specific conduct of the defendant was

the unauthorized taking of the handguns, which deprived the owner (Sheriff) of the property. The final element, the lack of consent by the Sheriff, is clear from the record. Campbell testified that he saw one of the other deputies take the handguns out of the plastic evidence bags and place them in a brown paper bag. This bag was subsequently removed from the Sheriff's office by the defendant. The use of the guns by the defendant as his own is inconsistent with their being held as evidence. R.C. §§ 2933.241 - .28 describes the procedure for handling items seized as evidence. From a reading of these sections it is clear that the Sheriff was unable to give the defendant permission to use the guns in the manner in which the defendant did. For the Sheriff to have done so would have required him to exceed the scope of his authority. Thus, as a matter of law, the Sheriff was unable to give his consent for such a use.

The defendant also contends that the verdict should be reversed because it rests, for the most part, on the uncorroborated testimony of one witness. What the defendant is raising, however, is not a question of sufficiency, but rather, one of credibility. This is a question of fact, however, not law. The weight to be given the evidence and the credibility of witnesses in a criminal case is primarily for the trier of facts. State v. DeHass (1967), 10 Ohio St.2d 230.

In the present case the defendant was given the opportunity to reduce Campbell's credibility on cross-examination. In addition, the defendant presented witnesses whose testimony was in conflict with that of Campbell's. Thus, the question before

the jury was one of credibility of the witnesses. When from the evidence presented reasonable minds can differ concerning whether each material element of a crime has been proved beyond a reasonable doubt, the question is one for the determination by the jury. State v. Swiger (1966), 5 Ohio St.2d 151. On the issue of credibility, the judgment of the jury, as the trier of fact, cannot be substituted by the judgment of the Court of Appeals. Trickey v. Trickey (1952), 158 Ohio St. 9. While the defendant correctly asserts that the case of State v. Reid (1965), 3 Ohio App.2d 215, properly sets forth the standard of review of the evidence on appeal, that case is not applicable to the present case where there is clearly no "absence of conflict" on the record. Id. at 221. Accordingly, the third assignment of error is not well taken.

There being no errors raised that would warrant reversal, the judgment of the trial court must be affirmed.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 36457

STATE OF OHIO	APPEAL FROM COMMON PLEAS COURT
Appellee	No. 22923 Cr.
-vs-	
MAJOR EDWARD PAYNE	JOURNAL ENTRY DISSENTING OPINION
Appellant	

Date: Feb. 28, 1978

JACKSON, J., DISSENTING

Because I find merit in four of the five errors assigned by appellant,[1] I must respectfully dissent.

The defendant in this case was indicted by the Grand Jury on November 17, 1975 upon four separate counts: two counts of theft in office in violation of Ohio Revised Code §2921.41 and two counts of intimidation in violation of Ohio Revised Code §2921.03. In essence, by the two

[1] Appellant's assignment of error number four asks us to hold that errors with respect to the theft in office count tainted the conviction with respect to the intimidation conviction. Because my disposition of the other assignments of error changes the context in which this assignment of error was raised, it is rendered almost meaningless. I find it unnecessary to express an opinion upon what would be, in effect, an academic question.

theft in office charges the State alleged that on one occasion Major Payne had stolen two pearl-handled pistols and that on another occasion he had stolen some $250.00 in cash. By the two charges of intimidation the State alleged that on one occasion Payne had intimidated Deputy Sheriff Trainee Campbell and that on the same occasion he had also intimidated Deputy Sheriff Vari. At his arraignment on November 20, 1975, the defendant entered a plea of not guilty to all counts, and trial commenced before a jury on February 3, 1976.

No case is tried in a vacuum and this is especially true of one where it is alleged that a public officer was engaged in criminal activity. As noted by the appellant, his trial was a "highly publicized case."[2/] The reasons for this are not hard to find. The indictment and the caption of the case indicates that the defendant bore the title of "Major." The record before us establishes that he was a Major on the staff of the Cuyahoga County Sheriff's office. Additionally, the defendant was the Warden of the Jail and the head of a special unit known as "Division Four" which conducted raids upon various illegal "after hours places" or "cheat spots" which operated in violation of statutes and regulations of Ohio governing liquor, gambling, and other similar matters. Thus, the high level of public interest in the defendant's case may be attributed to one or more of the following circumstances:

(a) The important position of trust which the defendant had held at the time of his indictment.

2/ Brief of Defendant-Appellant, p. 1.

(b) Prior publicity concerning his role in the raids conducted by Division Four.

(c) The fact that his high rank within the Sheriff's Department closely associated him, at least in the public mind, with Sheriff Ralph Kreiger, and that any criminal conviction of Major Payne would reflect poorly upon Sheriff Kreiger who was then facing an election contest in November of 1976.

Whatever the reason, it is evident from a reading of the transcript before us that all those involved in the case were vitally interested in its outcome.

At trial some twenty-six witnesses were called to testify. The issues were hotly contested. The State relied principally upon the testimony of Deputy Trainee Campbell to the effect that he had seen the defendant leave the offices of the Sheriff with two pearl-handled automatic pistols and that on another occasion the defendant had told Campbell that if he didn't cooperate with the defendant by giving him copies of certain reports the defendant would "make sure you never get to court."[3/] At the conclusion of the State's case, the trial judge concluded that the State had submitted insufficient

3/ Campbell's testimony was corroborated in varying degrees by the testimony of his wife; his partner Deputy Vari; and of the informant Sims Goodman, Jr., but as the majority correctly notes, it was Campbell who was the "chief witness." Journal Entry/Opinion at 2.

evidence upon the charge of intimidating Deputy Vari and accordingly entered a judgment of acquittal upon that count.

For its part, the defense relied upon numerous witnesses in its attempt to prove several "negatives": that the two pearl-handled automatic pistols did not even exist; that the pistols had not been seized on a raid at 10001 Cedar Avenue as claimed by the State; that neither Trainee Campbell nor Major Payne had been present at Division Four Headquarters at the time when Campbell alleges the weapons were stolen; that Trainee Campbell was not the subject of intimidating statements by the defendant; and that at the time of the alleged statements Trainee Campbell was not on duty and thus could not have been intimidated with respect to his position as a public servant.

The matter was submitted to the jury upon two counts of theft in office and one count of intimidation. On February 13, 1976 the jury returned a not guilty verdict upon the charge of the theft of $250.00, but guilty verdicts upon the theft offense pertaining to the two pearl-handled pistols and upon the intimidation charge pertaining to Deputy Trainee Campbell. Thus, the issues before this Court relate to the validity of the conviction upon two charges: (1) that defendant Payne stole two pearl-handled pistols from the Sheriff's office; and (2) that defendant Payne intimidated Deputy Trainee Campbell so as to hinder or attempt to hinder him in the discharge of his official duties.

Sentencing was continued until May 12, 1976. At that time the trial court gave

the defendant concurrent sentences of two to ten years and three to ten years. A timely appeal was commenced in which the appellant presented to this Court five assignments of error. The reasons upon which I base my conclusion that four of the assigned errors have merit are set forth below in seriatim.

I.

In his first assignment of error the defendant-appellant claims that the trial court erred in not granting him a judgment of acquittal on the charge of theft in office. In support of this assignment of error the appellant sets forth three independent grounds upon which he believes that such a judgment in his favor should have been granted. I concur with the majority in its disposition of the first and third grounds advanced in support of the assignment of error. Nevertheless, I find that the remaining claim raises such a substantial error under the state and federal constitutions as to require reversal.

In the second ground upon which his assignment of error is based the appellant argues that:

> "As a Matter of Law, The State Failed to Meet the Burden It accepted of Proving That The Seizure of The Pearl-Handled Guns By the Sheriff's Department was Lawful."

The copy of the indictment which is part of the record before this Court reveals that the appellant was charged with having committed theft in office from the Sheriff's

Department. The prosecutor told the jury that the State accepted the burden of proving beyond a reasonable doubt that a lawful seizure had taken place. (T. 19-20) The trial court instructed the jury that it was required to find that two such weapons had been lawfully seized prior to the theft offense in order to return a verdict of guilty. (T. 1385-1400)

The majority opinion, as I understand it, does not in any way intimate that the State of Ohio met the burden of establishing beyond a reasonable doubt that the Sheriff's office had ever lawfully seized two such pistols. Even a careful reading of the transcript will fail to reveal any evidence from which it could be inferred that two pearl-handled automatic pistols were lawfully seized by the Sheriff's office at any time.

There were two search warrants introduced into evidence in the proceedings below, but neither of these authorized the seizure of weapons. Therefore, any seizure of such weapons was made without the authorization of a warrant. Warrentless seizures are per se unreasonable unless they fall within certain well-defined and limited exigencies. E.g., Coolidge v. New Hampshire (1970), 403 U.S. 443, 454-455; Katz v. United States (1967), 389 U.S. 347, 357. In the case at bar there was no testimony as to who allegedly seized the weapons; as to the identity of a single person who witnessed the alleged seizure; or as to the circumstances under which such alleged seizure took place. Indeed, none of the witnesses who testified in the trial claimed to have any knowledge about facts or circumstances which would indicate that this warrantless

seizure fell within one of the exigencies to the warrant requirement. In the total absence of any evidence with respect to the facts and circumstances of the alleged warrantless seizure, it is beyond dispute that the State failed to prove the lawfulness of the alleged seizure.

The majority finds that this failure of proof is not fatal to the case presented by the State on the theory that the lawful possession of the property by the Sheriff prior to the alleged theft was not one of the elements of the crime under Ohio Revised Code Section 2921.41. I agree with this interpretation of the statute. At common law it was well established that theft, or larceny, was an offense against possession; that the crime focused upon the "wrongful taking" of the property and not the status of the person from whom the property was taken. See LaFave & Scott, Criminal Law §87 (1972). It was therefore possible at common law for a theft offense to be committed even when an item was taken from another thief who had initially stolen the property from another. Over the years Ohio has codified this common law view in many of her statutes relating to crimes of theft. E.g. State v. Shoemaker (1917), 96 Ohio St. 570. I find that such was the intent of the legislature in adopting R.C. 2921.41 and that under the statute the state need not show that the victim had "lawful possession" of the property taken. Rather proof of "mere possession" is sufficient to meet the requirements of the statute.

However, the fact that the State of Ohio could have prosecuted the appellant for a crime against "mere possession" does not change the fact that the State did

prosecute the appellant for a crime against "lawful possession". Under Section 10 of Article I of the Ohio Constitution and the Sixth and Fourteenth Amendments of the United States Constitution,[4] the State is required to give an accused "fair notice of the criminal charge one will be required to meet..." United States v. Pandilidis (6th Cir. 1975), 524 F.2d 644, cert. den. (1976) 424 U.S. 923. Accord: Du Brul v. State (1909), 80 Ohio St. 52, Syl. 1.

Yet in the case at bar the appellant was led to believe that he could be convicted of the crime of theft in office only if the State could prove beyond a reasonable doubt that the alleged seizure by the Sheriff's office was lawful. And it was not until December 6, 1976, some nine months after appellant's conviction, that the County Prosecutor's office announced for the first time that the allegations of lawful seizure were mere "surplusage" which the State was not obliged to prove. Brief of Appellee at 22.

Prior to that time, each and every other representation of the State was that it was charging appellant with an offense against lawful possession and that the State would assume the burden of attempting to prove such lawful possession beyond a reasonable doubt. Examples of the affirmative actions by the State in leading the

4/ On the applicability of these federal guarantees to state trial proceedings see Watson v. Jago (6th Cir. 1977), 558 F.2d 330, and In re Oliver (1948) 333 U.S. 257, 273 and Cole v. Arkansas (1948), 333 U.S. 196, 201, cited therein.

appellant to believe this was true include the following:

(1) The language "lawfully seized" was included in the wording of the indictment in such a manner as to make it appear to be one of the elements of the crime.[5]

5/ It is, of course, well established that a defendant may rely exclusively upon the indictment to properly set forth the elements of a crime and that where there is a defect even a correct citation to the statute under which the accused is charged will not cure the error. E.g., State v. Burgun (1976), 49 Ohio App. 2d 112, Syl. 2. In considering the extent to which such reliance may have been justified several factors must be considered:

(a) The prosecutor is the legal advisor of the Grand Jury. See R.C. 2939.11. As such he or his assistants must necessarily assist the Grand Jury in the drafting of the indictments. According to Prosecutor John T. Corrigan, the assistant prosecutors assigned to work with the Grand Jury are "among the most qualified and experienced" in his office. Report of the Cuyahoga County Grand Jury, September 1975, fn. 142.

(b) The indictment was signed by Grand Jury Foreman Ovid C. Lewis, who is an Attorney at Law, Hearing Examiner for the Ohio Civil Rights Commission, former Professor of Law at Case Western Reserve University and current Professor of Law at the University of Northern Kentucky. See Directory of Law Teachers (West 1976).

(c) The indictment is countersigned with the name of the County Prosecutor, John T. Corrigan, who, in his more than twenty years as Prosecutor, has had ample time to acquire a wealth of experience with the innerworkings of the Grand Jury and the indictment process.

(2) The same language was republished in the Bill of Particulars furnished to the accused by the Prosecutor and was again made to appear as one of the elements of the crime.[6]

(3) In his opening statement to the jury, Assistant County Prosecutor Walsh stated:

> "We, the State of Ohio, have the burden of proof and we accept that burden...
> We will...prove...beyond a reasonable doubt that...Major Edward Payne...obtained for his own use two 9-millimeter firearms with pearl handles...from property lawfully seized by and in the possession of the Cuyahoga County Sheriff's Department." (T 19-20) (emphasis added).

(4) Though it appears that the State was fully aware of the fact that in certain circumstances it could change the language of the indictment,[7] at no time during these proceedings did the State attempt

6/ It may be noteworthy that in this case -- unlike most of the cases which come for review before this Court -- the Bill of Particulars bears the name of the County Prosecutor himself rather than one of the Assistant Prosecutors.

7/ See original indictment for the charge of intimidation of Deputy Trainee Campbell bearing notation "amended" and the docket entry of January 26, 1976, relating to the Amendment of the Bill of Particulars.

to remove the terms "lawfully seized" either by a motion to amend under Criminal Rule 7 (C)[8] or a motion to strike as surplusage under Rule 7 (D).

(5) The trial Judge, without objection from the State, reread the indictment to the jury during his charge, including the allegation that the firearms had been "lawfully seized" by the Sheriff's Department. (T 1285).

(6) In his charge to the jury the trial Judge, without objection from the State, told the jury that with respect to the theft offense:

> "Before you can find the defendant guilty of the charge, you must find beyond a reasonable doubt that in Cuyahoga County... on or about the 19th day of April, 1975...that:
> "1. That the defendant was a public official.
> 2. That he used his office in aid in committing a theft offense, in that:

8/ But it should be noted that the "lawfully seized" language clearly "...enlarges...the allegation necessary to constitute a charge of crime..." and it therefore does not fall within the normal definition of surplusage, State v. Stepely (Hamilton Cty. C.P. 1908) 19 Ohio Dec. 110. It is therefore unlikely that a Rule 7 (C) motion could have justifiably been applied to the case at bar.

3. That he knowingly and purposely
4. Obtain[ed] for his own use...two 9-millimeter firearms with pearl handles on them...
5. From property lawfully seized by and in possession of the Cuyahoga County Sheriff's Department." (T. 1188-1189) (emphasis added)

(7) The trial court, without objection by the State, defined for the jury the meaning of the term "lawfully seized." (T. 1291)

(8) The trial court, without any objection by the State, caused verdict forms to be prepared, read such forms to the jury, and ultimately gave such forms to the jury for its use in deliberations, in which the "guilty" verdict form for the theft in office offense relating to the weapons read, in relevant part:

"We, the jury...do find [that the defendant] obtained for his own use two 9-millimeter firearms ...from property lawfuly seized by...the Cuyahoga County Sheriff's Department." (T. 1300) (emphasis added).

(9) It was the above quoted form which the jury signed when returning their verdict of guilty upon the theft offense.

With the record in this posture, I find it difficult to conceive of any manner in which the failure of proof by the State could be justifiably ignored. I would think that common notions of fairness alone would require that the appellant be granted a new trial. Since it is apparent that throughout the trial and up until the time of the filing of the appellee's brief in this court, that the State of Ohio represented to the accused and to the jury that "lawfully seized" was one of the elements of the crime. I would hold that by its own conduct the State placed itself in such a position as to make it impossible to lawfully convict appellant without proof that the Sheriff's Department had, in fact, lawfully seized two such pistols.[9/] Further, I believe that such a conclusion is required by state law, the Ohio Constitution, and the Federal Constitution.

With respect to requirements of state law, as far as I can determine, there are but four Ohio cases in which this issue has specifically arisen. The first of these was Pringle v. State (Muskingum Cty. Supreme Ct., 1847), 1 Dec. Rpt. 283, 7 West. L.J. 67. The defendants had been indicted for removing the body of a deceased from the grave without the consent of relatives, "there being then and there a widow and children" of the deceased.

9/ A recent opinion from this Court has made it unmistakeably clear that counsel and an accused can rely upon the elements set forth in the indictment and is not required to resort to the statute in order to determine what charge is brought against the accused. State v. Burgun (1976), 49 Ohio App. 2d 112, Syl. 2.

In spite of the fact that the evidence adduced at trial established that there was no widow, the case was submitted to the jury on the merits and ultimately a general verdict of guilty upon all counts was returned. The judgment was reversed on appeal for the reason that

> "...although the allegation that the deceased left a widow was not necessary, yet that it was descriptive of a material allegation and that the prosecutor was bound to prove as laid." Pringle v. State, supra, (emphasis added).

A similar result was reached by the Ohio Supreme Court in Price v. State (1850), 19 Ohio 422 with respect to the attempt by the State to make a more precise identification of a victim by using his middle initial in the indictment. The first syllabus of the decision is as follows:

> "In a criminal proceeding, it is not necessary to insert the middle letter in a person's name; but if inserted, it must be proved as laid."

Accord: Hart v. State (1851), 20 Ohio Rprts. 49.10/

10/ It must be observed that insofar as the cases of Pringle v. State, supra, Price v. State, supra, and Hart v. State, supra, precluded the state from amending its indictments to correct immaterial error they have been modified by statute, e.g. McHugh v. State (1884), 42 Ohio St. 154, 163-164, and superceded by our own Criminal Rules. See C.R. 7. However, they continue to be good authority upon the question of the state's obligation to prove the material allegations it sets forth in its indictment when no such amendment is ever made.

Similar conclusions were reached more recently by the Ross County Court of Appeals in State v. Stone (1971), 30 Ohio App. 2d 49. In that case the court instructed the jury on an issue which was not one of the elements set forth in the statute and which was not alleged in the indictment. On appeal the defendant argued that it was error for the court to instruct on matters not placed in issue by the indictment. In finding that the defendant was not entitled to a new trial, the Court of Appeals concluded that the portion of the charge not covered by the indictment

> "inured to the benefit of the defendant as it required more proof than necessary to sustain the allegations of the indictment and, thus, could only prejudice the state." State v. Stone, supra at 53. (emphasis added).

Therefore I can only conclude that under state law when the state makes a material allegation in the indictment of a matter which it is not required to prove by statute, and fails throughout the trial proceedings and before the trial court loses jurisdiction by the filing of a Notice of Appeal to move to strike such allegation as surplusage pursuant to Criminal Rule 7(C) and also fails to move to amend the indictment under Criminal Rule 7(D), then the state is bound to prove such allegation beyond a reasonable doubt.

The same result is required by the fair notice requirements of Article I of the Ohio Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. In one of the first cases decided under Section 10 of the Bill of

Rights after the adoption of the Ohio Constitution of 1851, Chief Justice Ranney concluded that

> "...It is neither consistent with general principles or constitutional safeguards, to allow a man to be...put to trial upon a criminal charge in the dark." Dillingham v. State, (1855), 5 Ohio St. 280, 285.

An accused is entitled to "fair notice" of the specific criminal charges brought against him, e.g., Watson v. Jago (6th Cir. 1977), 558 F.2d 330, 338.

> "A criminal charge should be preferred with such certainty and precision as will reasonably apprise the party charged of that which he may expect to meet and be required to answer." Du Brul v. State, supra, Syl. 1 and p. 64. (Emphasis added)

In the case at bar it is clear to me that even up to the point that this case was submitted to the jury the defendant was led to "expect" that in order to win acquittal he had only to raise a question of reasonable doubt as to the allegation that two automatic pistols had been lawfully seized by the Sheriff's Department. As in Watson, supra, the effort by the state to prove that the weapons were lawfully seized prior to any theft offense "clearly appears" to have affected the course of the trial. Both parties conducted examination and cross-examination upon the issue of lawful seizure. To the extent that time, effort and energy was devoted to developing evidence upon this issue,

the defense was prejudiced. Further, given the nature of the trial proceedings below, it is impossible to tell what effect the absence of this issue from the trial might have had upon its outcome.

Finally, I find that fundamental fairness and concepts of due process of law should protect a defendant from being prejudiced by the actions of the state in placing material in indictments which have the effect of misleading both the defense and the trial judge; attempting to offer proof of such extraneous material before the jury; and then, after the trial, claiming that it was not bound to prove the same. In this case there appears to have been a universal misunderstanding as to the exact elements of the theft offense. The qualified and experienced assistant prosecutor who assumptively advised the Grand Jury was mistaken as to the elements of the crime. The Grand Jury itself was incorrect in the form of its indictment. The distinguished law professor who signed the indictment as Grand Jury Foreman also apparently overlooked the defect in the indictment. The experienced County Prosecutor whose name appears upon both the indictment and the Bill of Particulars apparently did not detect the error. Nor did the diligent assistant prosecutors who tried the case make any effort to correct the mistake by moving to strike surplusage under Criminal Rule 7(C) or to amend the indictment pursuant to Criminal Rule 7(D). Even the experienced trial judge failed to see the error and continually emphasized to the jury that it must find the evidence to have been "lawfully seized."

Ultimately, we must either conclude that the state was not required to prove

the "non-element" of lawful seizure and therefore hold that appellants Constitutional rights to notice were violated; or that the state did properly give the appellant notice of what it intended to prove, but failed upon one of the elements of that proof. In either event, reversal is required. In circumstances such as these, where the State failed to give the accused proper notice of what it did ultimately prove, and failed to prove what it gave the accused notice of, I am persuaded that Constitutional provisions of this state and the nation require reversal.11/

II.

Appellant's second assignment of error is as follows:

"THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S OBJECTION TO DONALD CAMPBELL'S

11/ There may also be double jeopardy implications in this type of error. For example, if the appellant had been acquitted an ingenious prosecutor might seek to justify a retrial upon the grounds that the non-element of "lawfully seized" made it impossible for the jury to find the appellant guilty and thus he was never placed in jeopardy. From this premise the state might argue that this case is identical to Price v. State, supra, and that reindictment and retrial can take place because:

"The facts necessary to sustain the second indictment could not have warranted a legal conviction on the first." Price, supra, at 425.

TESTIMONY CONCERNING THE CONTENTS OF A WRITING WHICH LINKED THE FIREARMS TO THE CEDAR RAID."

The theory of the case advanced by the State against defendant Payne with respect to the theft of firearms was that two pearl-handled automatic pistols had been seized by the Sheriff's Department during a raid on the premises located at 10001 Cedar Avenue, Cleveland, Ohio and that upon said weapons being brought to the Sheriff's office, that same day they were stolen by the defendant. In support of that theory the State elicited testimony from Deputy Trainee Campbell to the effect that on April 19, 1975, he saw two nine-millimeter pistols at the office of Division Four; that each of those weapons was contained in a plastic evidence bag; that attached to each of those weapons was a yellow evidence tag; and that written on the tag was the address "10001 Cedar." The later testimony was particularly important to the State since the background information presented by the State indicated that the writing on the tag was supposed to be the location from which any evidence attached to it had been seized. The appellant made a timely objection to such testimony (T 29) upon the theory that it was hearsay. The Ohio Supreme Court has defined hearsay as follows:

"Testimony of a witness as to a statement or declaration by another person is hearsay testimony where the statement or declaration is offered or used only to prove the truth of the matters asserted therein." Potter v. Baker (1955), 162 Ohio St. 488 Syl. 1.

See Also McCormick on Evidence, §246 (2ed 1972) and Rule 801 of the Proposed Ohio Rules of Evidence.

In this case the assertion was that the guns in question had been seized from 10001 Cedar Avenue. The witness Donald Campbell testified as to the nature of the assertion, but admitted that he had not written the address on the tag; that he did not know who had written the address on the tag; and, that he was not present at the raid on Cedar and, therefore, had no firsthand knowledge of what was and was not seized there. Consequently, if Campbell's testimony was offered for the truth of the matter asserted -- that the weapons were seized from 10001 Cedar Avenue -- then it is clear that it was hearsay and its admission was error.

The State argues that the evidence was not admitted for the truth of the matter asserted and that it was admissible as evidence of what Mr. Campbell himself observed. Appellee's Brief at 24-25. The majority seems to accept this argument for it concludes that "[t]he statement was not hearsay evidence in that it was descriptive of what the witness observed..." Opinion and Journal Entry at 10.12/ Of course all written hearsay may be described as simply being "descriptive of what the witness observed" and all oral hearsay may be said to be "descriptive of what the witness heard." If that were enough, then there would be no hearsay rule.

12/ I note that the Concurring Opinion by Judge Corrigan differs with the conclusion reached in the Opinion by Judge Patton that the statement on the tag was not hearsay evidence. However, Judge Corrigan found it to be harmless error.

The real question is whether the evidence offered was for a non-hearsay purpose. The State and majority both say yes -- but nowhere do they indicate what that purpose was. The test to be applied in determining whether such a non-hearsay purpose exists is a simple one. We assume, for purposes of seeking a non-hearsay purpose, that the testimony is false and then make the inquiry as to whether the evidence is still relevant to any issue in the case.13/ If it is, then a non-hearsay purpose has been discovered and the evidence is admissible.

I have carefully reviewed the record in an effort to discover any possible non-hearsay purpose for which this testimony could have been admissible and have failed to find any. I think it fair to say that the conspicuous silence of the State and the majority upon this question is an indication that they too were unsuccessful in their search to discover any non-hearsay purpose for which this testimony could be offered. This being the case, the decisions of our Supreme Court require that we find the admission of the testimony to be error.

The majority, apparently does not accept the mandate of the hearsay rule or overrule it directly, but avoids this consequence by two separate approaches.

Initially the majority takes the view that the testimony was not hearsay because it was "only circumstantial as to

13/ This assumption can properly be made for purposes of this test since to be admissible the assertion must be offered "without regard for its truth or falsity."

the source of the pistols." Journal Entry and Opinion at 10. I must admit that it is, however, difficult for me to determine the exact point the majority is attempting to make, since it is apparent that the hearsay rule precludes the introduction of inadmissible hearsay whether such is to be used as direct or circumstantial evidence of a matter in controversy. I can only conclude that the majority is admitting that the assertion cannot be used as direct evidence of the place from which the weapons were seized, since such would violate the hearsay rule; but that the very fact that any such assertion is made makes it more probable that the fact asserted therein is true, and accordingly the tag is admissible as circumstantial evidence of the location from which the weapons were allegedly seized.

Under this view hearsay should be defined as an out of court assertion "offered as direct evidence of the truth of the matter asserted." Cf. Potter v. Baker, supra. If this definition of the rule were adopted then hearsay evidence could never be excluded: for it could always be offered as circumstantial evidence of the truth of the matter asserted, subject only to a limiting instruction. The ultimate result of such a determination would be to destroy the efficacy of the hearsay rule.

In support of this rather unique view of the law of evidence, the majority relies upon two cases: United States v. Snow (9th Cir. 1975), 517 F.2d 441 and State v. Jackson (La. 1953) 65 So. 2d 903. Though the majority offers a brief recitation of the holding in these cases, no indication is presented as to what applicability they have in the case at bar.

The Snow case involved the admission of a briefcase which bore a name-tape spelling out the accused's name and in which was discovered an unregistered gun on which there was a latent fingerprint of the defendant. Though the Court's reasons for its decision are somewhat obscure, it appears the name-tape was admitted not to prove the assertion that it was the accused's briefcase, but rather to serve as circumstantial evidence of the fact that the briefcase had once been in the defendant's possession.

The Snow case relies heavily upon I Wigmore on Evidence (1940 ed.) §§149-160. An examination of those passages reveals that the issue being considered was whether some mechanical trace or brand could be used to "trace" certain chattels and thereby show possession or ownership. It states:

> "Now the argument from Traces assumes that the argument as to identity has been settled and accepted, i.e., here it assumes that the use of the gun in question is an essential or sufficient mark of the murder, and it then sets about to prove that the accused possessed that mark, i.e., used the gun; and to do this it offers the fact of its subsequent finding in the accused's possession." I Wigmore on Evidence, Supra, Sec. 149 at p. 58.

In the case at bar the fact that the guns allegedly bore a property tag of the Sheriff's office might properly be considered as circumstantial evidence of

possession of the property by the Sheriff's Department. But this portion of the testimony by Campbell was not challenged. However, the information written on that tag was in the nature of a testimonial assertion and could not be considered as a mere mechanical notation or brand by which an object could be traced.[14] Consequently the Snow case cannot aid the majority in seeking to avoid the effect of the hearsay rule.

State v. Jackson, supra, also fails to support the position asserted by the majority. In Jackson the defendant raised an issue as to whether the state, prior to the admission of his alleged confession, had proved the corpus delecti. In that case the body of the victim was brought to the morgue in the evening. A tag was placed on the body bearing the supposed name of the victim, "Frances Foster." The next day the assistant coroner conducted an autopsy on the body which bore the tag with the writing "Frances Foster" to identify it. He then testified at trial that his autopsy revealed that the person he examined had been killed by a criminal agency: two pellets of buckshot had been extracted from the brain. The appellant

14/ I Wigmore §150, p. 597 (1940 ed.) warns against attempting to extend the mechanical trace doctrine to cases such as this:

"But a caution is necessary in extending the analogy of these brand and mark cases to the use of tags and other documents. The basis of the inference in the brand cases is the known custom that only the owner ordinarily imprints a brand or mark of his initials, name, etc." (Emphasis in original.)

in that case objected to testimony as to the writing on the tag as hearsay because the coroner had not written the name on the tag. The court indicated that there might have been merit in this objection:

> "...Had the testimony sought to be brought out been offered for the purpose of identifying the body as that of Frances Foster merely because the tag which it bore had the name Foster written on it." State v. Jackson, supra, at 905.

But that was not the purpose for which the testimony was offered. In adopting the opinion of the court below the court quoted the following:

> "It is obvious that the tag placed on the body containing the name Frances Foster, was placed there to identify it from any other female body then in the morgue... At no time did the autopsy surgeon ever say he identified this body as that of Frances Foster..."

In other words, it didn't make any difference whether the name on the body was that of the victim or not. Even if the body was not that of Frances Foster, it was still the same body which had been brought into the morgue earlier that evening and as such the testimony was admissible for purposes of proving the corpus delecti. Therefore, rather than supporting the majority, in my opinion, State v. Jackson supports the correctness of the position I have advanced herein.

The second way in which the majority apparently seeks to avoid the effect of the hearsay rule is to discount the importance of the inadmissible testimony. Having determined that the state had no obligation to prove that the weapons in question had been lawfully seized from 10001 Cedar Avenue, the majority reasons that "appellant's heavy emphasis on the address on the tag is not well placed." Journal Entry and Opinion at 10. But to reach such a conclusion is to ignore the realities of the trial situation.

It was critical to the prosecutor's case to prove that the guns in question had been seized at 10001 Cedar for two separate reasons. First, the State properly believed that proof of lawful seizure was one of the elements of its case. Second, it vitally affected the believability of the State's theory of the case and the credibility of its key witness. Even if it were assumed, arguendo, that it would be legally sufficient for the State to show that the Sheriff's office had custody of the weapons prior to the alleged theft, this would leave unanswered natural questions as to where the guns had come from and to whom they belonged. It might even give rise to a reasonable doubt as to whether the defendant himself was the owner of the weapons. But if the State could prove to the satisfaction of the jury that the weapons had been seized in the Cedar raid then it would prove at least part of the "element" of lawful seizure; dispel any doubts as to the ownership of the weapons; and inferentially corroborate Campbell's testimony that two such weapons were in fact in the Sheriff's office at the time he claims the defendant stole them.

In view of the importance of this evidence in the attempt by the State to establish that there was an alleged lawful seizure of two 9-millimeter weapons from 10001 Cedar in order to prove the allegations of its indictment, and also to provide the jury with some credible support for its theory of the case, the error in admitting this hearsay evidence was prejudicial and requires reversal. See Lindsay v. B. & O. Rd. Co., (1954), 98 Ohio App. 63, Syl. 5.

III

In this third assignment of error, the Appellant maintains that:

> "THE VERDICT WHICH FOUND APPELLANT GUILTY OF THEFT IN OFFICE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

When a party comes before this Court raising claims that the state of the evidence in the record entitles him to reversal, this Court must necessarily act with caution in determining whether or not such error has merit.

The citizens of our state and nation have separately determined that the resolution of issues of fact should be, at least in the first instance, committed to a jury selected from the community in which the case is tried. Section 5, Art. I, Ohio Constitution; Art. III, Section 2 and Sixth and Seventh Amendments, United States Constitution. It is fitting that judges, whether presiding at trial or reviewing the record upon appeal, should hold the evaluation of the evidence by a jury in high regard and defer to its

judgment in all instances where the evidence is such that reasonable individuals might reach contrary conclusions.

At the same time, it is evident that the determination of factual disputes was committed to the jury not out of a belief that the decisions of the jury would always be correct, but rather from the hope that the jury would be more likely to safeguard the right of an accused to a fair resolution of the issues and to act as a check upon the part of the State.[15] See Duncan v. Louisiana (1968), 391 U.S. 145, 155-156. Because it was recognized that trial by jury alone would be insufficient to protect the interest of our citizens in attempting to insure that only the guilty would be convicted, universal provision was made for trials to be conducted under the supervision of judges.

While jurors were to be the triers of fact, trial judges were vested with the power to remove an issue of fact from

15/ As noted in Duncan v. Louisiana, supra, at 155-156:

> "The guarantees of the jury trial ...reflect a profound judgment about the way in which law should be enforced...[It] is granted to criminal defendants in order to prevent oppression by the Government...it was necessary to protect against...judges too responsive to the voice of higher authority. [It gave an accused] an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge...[It reflected] a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."

the jury by entering a directed verdict (judgment of acquittal), and to overturn a verdict by ordering a new trial. Thus, the power of the jury was balanced against the power of the trial judge, with each having a certain limited ability to check the action of the other. Similarly, appeals were instituted so that the appellate courts could act as a check upon both the trial judge and the jury. By this division of responsibility for the protection of the rights of the accused, it was hoped that those who were falsely accused of crimes would be able to avoid an unjust conviction.

Consequently, when a case comes before a reviewing court upon the claim that the court should reverse the judgment below because of the status of the evidence in the record, that court must both defer to the findings of the trier of fact and meet its own obligation of conducting an independent and meaningful review of the evidence in the record. Because these may be seen as conflicting duties, much confusion as to the proper standards of review has been endangered. However, a close review of the case law will reveal that in Ohio the Court of Appeals, when reviewing a criminal case, is to apply three successive tests to the evidence before it.

Initially, the Court must review the record to insure that the State has adduced at least some evidence upon each and every element of the crime.[16] If there is a total lack of evidence upon any element which the State is required to prove, then the Court has no choice but to reverse.

16/ This is often called the "no evidence" rule.

See e.g. State of Ohio v. Charles Gaines, (Cuy. Cty. Ct. App. April 10, 1975) No. 33621, pp. 8-9.

If there is at least some evidence upon each of the elements of the crime, then the Court must proceed to consider the "sufficiency" of the evidence. Under this standard, the reviewing court does not "weigh" the evidence, but in order to determine whether the evidence in the record is legally sufficient to support the verdict of the jury, the court examines:

> "The record to determine whether the evidence produced attains to that high degree of probative force and certainty which the law demands to support a conviction." State v. Urbaytis (1951), 156 Ohio St. 271, Syl. 4. See also Cole v. McClure, (1913) 88 Ohio St. 1.

Where the Court finds that there was some evidence before the jury, but that such evidence was not sufficient to allow reasonable people to find guilt beyond a reasonable doubt, then the judgment below must be reversed. State v. Urbaytis, supra. Accord: State of Ohio v. Robert L. Beale, (Cuy. Cty. Ct. App., June 28, 1973) No. 31884; State of Ohio v. Henry Ellington (Cuy. Cty. Ct. App., March 30, 1972).17/

17/ Since the due process clause of the Fourteenth Amendment requires that a State has to prove its case beyond a reasonable doubt, e.g. In re Winship (1970), 397 U.S. 358, it may well be that this standard of review is also required by the federal constitution. See Freeman v. Zahradnick, (Feb. 22, 1977) cert. den., 20 CrL. 4161 (Stewart, Marshall, Brennen, J.J., dissenting).

The third standard under which the record must be reviewed involves the question of whether the evidence is against the "weight of the evidence."18/ Though the federal courts lack the power to review a conviction under this standard, e.g. Glasser v. United States (1941), 315 U.S. 60, 80; Watkins v. United States, (6th Cir., 1977) 564 F.2d 201, 204, its history in Ohio is a long one. E.g. Spafford v. Bradley (1851), Ohio St. 76. Though the use of this standard seems to have been of statutory origin, it has long been of state constitutional stature. See Section 3(B)(3), Art. IV, Ohio Constitution. Accordingly, the Supreme Court has held that where the issue is properly presented to the Court of Appeals, that Court is "required" to weigh the evidence. State ex rel Squire v. Cleveland (1948), 150 Ohio St. 303, Syl. 8. Under this standard, if the court finds that the verdict of the jury, while supported by sufficient evidence, is nevertheless against the weight of the evidence it is obligated to reverse the judgment and remand for a new trial. E.g. State v. Robinson (1955), 162 Ohio St. 486;

18/ Some authority suggests that the terms of weight of the evidence and sufficient evidence are merely different names for the same standard of review. But this view was clearly rejected in State v. Robinson (1955), 162 Ohio St. 486. Further, the Supreme Court's repeated emphasis of the fact that it will review a decision to test the sufficiency of the evidence, but that it will not weigh the evidence, e.g., State v. Urbaytis, supra, should emphasize that the terms do have different meanings. It should be noted that unlike the appellate courts, the Ohio Supreme Court by statute is not required to weigh the evidence. R.C. 2953.02.

State of Ohio v. Ross Accardi (Cuy. Cty. Ct. App., December 21, 1973), No. 32388.

In the case at bar, it is my opinion that the conviction upon the charge of theft in office cannot pass muster under any of these standards of review.

A.

As set forth more fully above (I, supra), the conduct of the State in prosecuting appellant for having stolen two weapons allegedly lawfully seized from 10001 Cedar, obligated it to prove the same. Though there is "some" evidence from which it might be inferred that two such weapons were seized during the Cedar Avenue raid, there was absolutely no evidence from which any such seizure could be said to be "lawful". Thus, the "finding" by the jury that a lawful seizure took place was without any support in evidence. This obviously requires reversal under the "no evidence" rule, the "sufficiency" test, and the standard pertaining to the weight of the evidence.

B.

Even if it were assumed, arguendo, that the State was not required to prove the material allegations set forth in the indictment, the record shows that the verdict, while supported by sufficient evidence, was clearly contrary to the weight of the evidence.

As the majority notes in its Journal Entry and Opinion at 12, the State presented only two witnesses from whose testimony it could be concluded that the defendant

committed a theft offense.[19/]

19/ An additional witness who is not mentioned by the majority is Cleveland Press reporter James Marino, who was present at the Cedar raid and who subsequently wrote a news article concerning that raid. At the time of the raid, Mr. Marino knew some guns were confiscated, but did not know how many. He asked Chief Administrative Assistant, Marion Koszewski about the number of guns confiscated and was told to call Koszewski later in the day [T. at 1003]. He never talked to Koszewski later in the day, but apparently did reach the defendant some time between 7:00 and 7:30 a.m. Mr. Marino testified that the defendant had told him that six handguns had been confiscated [T. at 506-7]. Since the Sheriff's property book only recorded the confiscation of four handguns, this constitutes circumstantial evidence from which it could be concluded that two handguns had been seized which were not entered into the property book.

But this is only circumstantial evidence and there are reasonable explanations for this disparity which are consistent with the defendant's claim of innocence. Initially, it is highly unlikely that Major Payne would have told Mr. Marino that six handguns had been confiscated if Payne had intended to steal, or had stolen such weapons. But since Mr. Campbell claims to have witnessed the theft offense in the Sheriff's office prior to the time he went home between 6:30 and 7:00 a.m. [T. 33] and since by Mr. Marino's testimony indicates that

One of those witnesses was Sims Goodman, Jr. Mr. Goodman testified that he knew two individuals named "Van" and "Big Jordan" who owned 9-millimeter automatic pistols with pearl handles; that he had seen those two individuals at the location of the Cedar raid; that after the Cedar raid he learned that those individuals were carrying different weapons; and that the two individuals had made statements to him from which it could have been concluded that the Sheriff's Department

---

his conversation with Major Payne took place between 7:00 and 7:30 a.m., the theft offense would have already been committed at the time Major Payne spoke to Mr. Marino. If, as the State argues, the defendant stole the weapons and made sure that no entry was made of the seizure of such weapons in order to cover up his crime, then it would be stretching credulity to believe that he would volunteer such potentially incriminating information to a newspaper reporter.

A much more likely hypothesis is that either Mr. Marino misunderstood the defendant or that the defendant himself was misinformed about the number of handguns seized. For example, State's Exhibit One shows that four handguns, a shotgun, and a billy club were seized. It is entirely possible someone told Major Payne that six weapons had been seized, one of which was a shotgun, and Major Payne incorrectly concluded that six handguns had been seized and a shotgun. Or, Major Payne could have been correctly informed, but a similar misunderstanding occasioned between himself and Mr. Marino.

had seized the original weapons.[20]

As previously discussed this testimony was extremely important to the State for two reasons. First, it was the only competent evidence before the jury which even circumstantially supported the State's theory of the case that two nine-millimeter weapons had been seized at the Cedar address and transported to the headquarters of Division Four where they were later stolen. Second, it corroborated Mr. Campbell's testimony with respect to the alleged theft, insofar as it was indicated that the weapons were seized in the early morning hours of the same day in which Campbell says the theft offense occurred and in that both the guns described by Campbell and those described by Goodman were identical.

In considering the weight to be accorded Mr. Goodman's testimony, several factors must necessarily be considered. Initially, his character and background are such as to make any testimony that he might give about any matter suspect.

At the time of his testimony he was incarcerated at a state prison. He was only twenty-five years old (T. 331), but

---

[20] Goodman indicated that subsequent to the Cedar raid he asked Mr. Lapsley where his weapon had gone and Lapsley replied: "Some bright nigger got it." (T. 369). According to Goodman he presumed that that meant Major Payne had gotten the gun. He further indicated that at a later date he asked Mr. Jordan the same question and Jordan's response was: "That nigger Payne got the gun" (T. 371).

had managed to work as a numbers runner (T. 308, 331), a "shaker" in after hours places (T. 308), a pimp (T. 303), and had accumulated three felony convictions (T. 273-74). He also testified that during his life he had never held any steady job in any lawful employment (T. 275, 332).

He claimed to have known of the weapons carried by Mr. Jordan and Mr. Lapsley because of his employment as a "shaker" (guard) at an illegal after-hours place. He claimed to have been present at the Cedar raid because he was collecting his money from the prostitutes for whom he pimped (T. 302, 303).

Next, Goodman had a strong motive to testify falsely against the defendant. As the majority notes, there is evidence in the record before us to the effect that certain unnamed members of the Cleveland Police Department were accepting payment from operators of illegal after-hours places and agreeing to then allow them to operate in violation of the law. Moreover, the record before us indicates that on one occasion someone from the police department had given warning of an upcoming raid by the Sheriff's Department,[21] and on another

---

[21] Testimony concerning an aborted raid at Matherson Avenue, Cleveland, Ohio:
Deputy Trainee Campbell: "When we arrived there...the owner of the establishment was sitting out on the hood of his car...and he stated that he had been advised there was a raid coming down and he closed." (T. 25)
Deputy Hosea Garner: "...the Cleveland Police had come by and told them the Sheriff's Department was going to hit the address that night." (T.1103)

occasion the owner of an alleged after-hours place complained bitterly to members of the Cleveland Police Department that, even though he had paid them several thousands of dollars, the Sheriff had raided his place of illegal business.[22]

Obviously, if this were true both the after-hours owners and the police involved with them would have substantial reason to want Major Payne to be removed from the Sheriff's office.[23]

According to Goodman, after the two raids that are the subject of the within appeal he started to come under pressure from the

---

[22] State's witness Goodman gave a statement which read, in part:
"I observed Frank Sumpter arguing with some Cleveland policeman. I saw three cars. Frank Sumpter was very upset because he was shouting at the top of his voice."

Question: "Did you hear any of Frank Sumpter's conversation with the Cleveland policeman?"

Answer: "Yes, he said what the hell is going on. I pay you people thousands of dollars a week and you can't even tell me when the police are going to come and tear my" -- there's a profane word -- "joint apart." See also T. 337; 377

[23] According to State's witness Goodman, one such owner, with whom he was apparently on good terms, told Goodman: that he "had to find a way to get back" at the defendant for raiding his place. Defendant's Exhibit B, p. 4.

Cleveland Police Department to provide them with information so they could "get" the defendant. (T. 333 and 335) The specifics of one such attempt were recounted by Goodman as follows:

"[Police Detective Sgt. Levi] said, 'Hey, Junior, you got anything for me?' I said, 'No, sir, I'm still working on it pretty hard. Payne's a rough man to catch up on. He said he better not be hard to catch up on because you only have up until Friday. If you don't come with something by Friday, you go to court on Friday and you better" -- there's a profane word there that I'll omit -- "a-had better have something or come up with something and when I say come up with something, I mean something on Major Payne, or your ass will never get out from what is going to be put on you in court.'" (T. 395)* According to Goodman, he was promised that he would get probation on an undisclosed pending offense and that his "palms would be greased pretty good," if he gave a statement against Major Payne.* Defendant's Exhibit B, p. 1. He was also threatened: He was told that "your ass is out on a limb and from what I hear there are a lot of guys you put in Mansfield who would like to get you." (T. 396)*

Mr. Goodman indicated these things at the time he refused to cooperate with the police. Subsequently Mr. Goodman was incarcerated, and he sought the assistance of defendant in securing his release. Mr. Goodman described the results of his conversation with defendant Payne and Kreiger,

---

* Material read into record at trial from Def. Exhibit B, a statement made by Goodman to Sgt. Szalay of the Sheriff's office.

as follows:

"I wanted to talk about getting some help for me, but it was no kind of help for me..." (T. 317)

This conversation took place sometime after December 24, 1975. (T. 314)

On January 19, 1976, Goodman was sentenced to two to five years for receiving stolen property, and one to fifteen years for possession of a concealed weapon. (T. 273-274) He was transferred from the Cuyahoga County Jail to the Chillicothe Correctional Institute on January 22, 1976. (T. 274) On January 28, 1976 the assistant prosecutors who tried this case traveled to Chillicothe where Mr. Goodman apparently agreed to be a witness in this case. (T. 312) He took the stand against the defendant on February 5, 1976, and stated under oath that no promises had been made to him by the prosecutors in exchange for his testimony. (T. 270)[24]

---

[24] The record does not disclose any information as to whether or not others, such as members of police department with whom the witness had previously been in contact, made any promises to Mr. Goodman. Whatever the role of the State, it is clear that in view of the previous conversations with Sgt. Levi that Mr. Goodman may have felt assured -- or at least held out the hope -- that he would receive leniency in exchange for his testimony. Though such a hope would not provide any certainty in the quid pro quo, it might tend to influence the testimony of a witness even more than a firm commitment:

Mr. Goodman's testimony itself contradicted the State's case in one regard. He testified that both Mr. Jordan and Mr. Lapsley had told him that the defendant had "gotten" their guns. (T. 369; 371) Yet according to Campbell, the weapons were brought into the headquarters of Division Four, and did not come into the possession of Major Payne until he left the office that day. Even if the State is correct in its claim that Major Payne stole the guns, Jordan and Lapsley would have no way of knowing that the weapons had even come into his hands.

Further, the testimony by Goodman was contradicted by circumstantial evidence. Though fifty-two people were arrested in the Cedar raid and though numerous deputies participated in the raid, the State failed to produce a single witness who could testify that two pearl-handled weapons were seized there. Neither did the State ever produce the weapons that were allegedly stolen. Further, each of the individuals who testified during the trial, and who were also present at the Cedar raid, testified that, while they had seen certain other weapons during the course of the raid, they had not seen any pearl-handled automatics. The individuals so testifying were Detective

---

"...rather than weakening the significance for credibility purposes of an agreement of favorable treatment, tentativeness may increase its relevancy. This is because a promise to recommend leniency (without assurance of it) may be interpreted by the promisee as contingent upon the quality of the evidence produced -- the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor." Boone v. Paderick (4th Cir. 1976), 541 F. 2d 447, 451. (emphasis added)

Hosea Garner,[25] Captain Ronald Brown,[26] Deputy Edward Thornton,[27] Detective Burgess,[28] Reporter James Marino,[29] and Reporter Powell C. Caesar.[30]

Finally, testimony by Goodman was directly contradicted by the very men who he claimed owned the weapons and from whom he declares they were seized. Mr. Lee Jordan testified that he had not been at the "after-hours" place located at 10001 Cedar Avenue on the night on which the State claimed the gun was seized and that he never goes into after-hours places.[31]

25/ Six weapons seized: four handguns, a shotgun and a billy club. (T. 1110)

26/ He had knowledge of one weapon seized. (T. 1066-67)

27/ Four handguns seized.

28/ No automatic weapons were seized (T. 689-690)

29/ He found one weapon himself, but did not see any pearl-handled pistols. (T. 512-513)

30/ He saw four handguns and a shotgun seized. (T. 727) All the handguns were revolvers as opposed to automatics (T. 744, 745) and he saw no weapons with pearl handles.

31/ The following dialogue took place during the prosecutor's cross-examination:

"Q. And you say you don't gamble?
A. I don't gamble man. I refuse to sell a pair of dice in my store. I don't deal with these type of people." (T. 874)
Q. Did you ever go in an after-hours place just to drink and not to gamble?
A. I don't drink. I don't go in after-hours places period."

Mr. Jordan further testified that for the last fourteen years he has been the owner of a grocery store which he operates and which is generally open seven days a week. (T. 854; 858) He testified that he is married and has eighteen children. (T. 853) He further testified that his brother has been a member of the Cleveland Police Department for approximately ten years and that he himself has held a commission from the City of Cleveland as a private policeman for approximately eight years. (T. 854; 878) His uncontradicted testimony was that his commission as a private policeman authorized him to carry a weapon. (T. 879) He indicated that he owned a .38 revolver and a shotgun and had owned other weapons in the past, but that he had never owned an automatic weapon such as the one the State claims was stolen by the defendant. (T. 870)[32/] In its attempt to impeach his credibility, the State not only asked Mr. Jordan whether he had any prior state or federal convictions, but also improperly inquired as to whether he had ever been arrested upon any state or federal offense or that his store had ever been found to have any state liquor violations. (T. 856; 864) In each instance Mr. Jordan answered in the negative. (T. 856; 864)

According to the State, the second weapon lawfully seized by the Sheriff's Department, and subsequently stolen by the defendant, was also a pearl-handled nine-millimeter

---

32/ On cross examination by the prosecutor:

Q. Did you ever own an automatic?
A. No. I don't fool around with no automatic, never did.

A. I don't know what a 9-millimeter looks like.

A. ...I never deal with no automatics, period. I'm scared of them. (T.870)

pistol. The State claimed that this weapon was seized from Mr. Ivan Lapsley at the same raid at 10001 Cedar Avenue. Mr. Lapsley testified that he had been married for eighteen years, was the father of three children, and that for the last eighteen years he has been the manager of a grocery store. (T. 880-881)[33/] In addition to working as the manager of the grocery store, Mr. Lapsley testified that he did exterior decorating and was the President of Fields Investment Company. (T. 885) Previously he had been the owner of a record shop. (T. 887) Mr. Lapsley testified that on the night in question he had not been at 10001 Cedar; that he doesn't "go to those joints;" (T. 882; 895) and that he had never been on the premises at 10001 Cedar Avenue. (T. 896) Mr. Lapsley indicated that he owned a shotgun, a rifle, and a .38 Smith & Wesson, but that he had never owned a nine-millimeter nickle-plated weapon with snow white grips. (T. 882) He further explicitly denied, upon cross-examination, that any nine-millimeter weapon had been taken from him. (T. 895) In attempting to impeach his credibility, the prosecutor asked Mr. Lapsley whether he had ever "been arrested or convicted of any state or federal offense." (T. 890) Mr. Lapsley responded that he had not. (T. 890)

The second witness was, of course, Deputy Trainee Donald Campbell. Mr. Campbell's testimony upon this issue was that he was present in offices of Division Four on the morning of April 19, 1975; that he saw two pearl-handled, nine-millimeter pistols, each in a sheriff's plastic property bag with a property tag attached; that he heard

---

33/ This is not the same store owned by Mr. Jordan.

for the reason that they allegedly were stolen some three months prior to the trial.

The following are some of the alleged circumstances surrounding the alleged theft: By his testimony Deputy Campbell indicates the important nature of these reports and the fact that he considers them necessary for his own protection. On one occasion he even places them, for a short period of time, in Deputy Vari's protection. (T. 492)[34/] He even made an extra copy of the documents, but on the night of the theft, both copies of the documents are in a valise or attache case. The attache case is not secreted anywhere in the house, but left downstairs on the sofa in the Campbell's living room. The case, with both copies of all the vital documents which Campbell needs for his own protection, is stolen from their home in November of 1975, after a burglar pushed through some tape protecting the lock on the door, made entry, and picked up the attache case which was conveniently laying on the sofa. (T. 428)

Equally difficult to understand is the attitude displayed by Campbell toward the defendant. He claims to have seen him commit a theft offense in April of 1975 and records the matter in the notes he is collecting to protect himself. (T. 187) Yet in late June or early July, Deputy Trainee Campbell files a written report with Sheriff Kreiger, sending a copy to Major Payne, indicating that certain deputies are making false accusations against Campbell, and that this is an attempt to "get to Maj. Payne and the Sheriff."

[34/] Mrs. Campbell's testimony was that the documents were given to Deputy Vari so he could read them. (T. 440)

Major Payne express an interest in having the weapons; that he saw Deputy Hosea Garner remove the weapons from the property bags and place them in a brown paper bag; and that when Major Payne left the office that day, he took the weapons with him.

Campbell presented essentially the same scenario with respect to Major Payne's alleged theft of the $250.00 cash. The jury acquitted the defendant upon that account, assumptively because the defense produced xerox copies of some of those same bills -- identified by serial numbers -- which had been signed by witness Campbell indicating that he had subsequently received the same for official use in his capacity as an undercover deputy.

There are also portions of testimony by Deputy Trainee Campbell which are particularly troublesome. For example, as discussed below, frequent references are made to "reports" and "notes" that Deputy Campbell had in his possession. His testmony suggests that these documents must be extremely valuable, because, according to Campbell, numerous people in the Sheriff's Department had been threatening and harrassing him in an effort to obtain them. Yet it is clear that many of these documents were simply duplicates of reports Campbell had already filed with the Sheriff's Department. Further, Campbell specifically disavows any intention to use the notes to have anyone prosecuted, but only says that he kept such notes for his own protection. In spite of their apparent importance to the case, and in spite of the fact that their contents were known by Mr. Campbell, his wife, and Deputy Vari, there was no specific testimony adduced from any witness as to the contents of the documents. These documents were not introduced into evidence

Defendant's Exhibit A. The report also states that some other deputies have also said that Major Payne and Capt. Brown were "in line" for a "pay back" and that they could be "set up to a point where they will no longer be a hindrance..." Defendant's Exhibit A. The concluding line of the report is that Deputy Trainee Campbell:

> "wishes to state at this time that any and all information picked up will in fact be forwarded to Maj. Payne immediately and at no time will this deputy allow any of this particular activity to reach a state that it cannot be controlled." Defendant's Exhibit A.

Similarly, when Mr. Campbell was on the stand testifying in the present case, he indicated that in his opinion Major Payne was a "pretty good" law enforcement officer.

Finally, there was direct evidence contradicting the charge by Mr. Campbell that Major Payne stole the two weapons in question. First, Deputy Hosea Garner specifically denied that any such guns were present in the offices on that day in question; he denied that he had given Major Payne the weapons; and he denied the charge that Major Payne had stolen the weapons. (T. 1114-1118) Garner's testimony was corroborated by Deputy Thornton (T. 625), Deputy Burgess (T. 661, 683), and Deputy Bly (T. 760-761, 766); each of whom testified that neither Mr. Campbell nor the appellant were present in the Division Four offices at the time when Deputy Campbell claims to have witnessed the alleged theft.

The foregoing is a detailed account

of the evidence we are required to weigh.[35/] It involves the testimony of Mr. Goodwin and Mr. Campbell on the one hand, and the testimony of Mr. Jordan, Mr. Lapsley, Deputy Garner, Captain Brown, Deputy Thornton, Deputy Burgess, Reporter Marino, Reporter Caesar and Deputy Bly on the other hand. In performing this task, we are guided by various considerations:

1. Knowledge that even a reviewing Court of Appeals is not required to accept as true the incredible. E.g., Schaefer v. Cincinnati (1945) 75 Ohio App. 288, 292.

35/This review of the evidence, in my opinion, reveals the incorrectness of the assertion in the Concurring Opinion by Judge Corrigan that there is no dispute that the defendant "...obtained and exerted control over the property in question." Concurring Opinion at page 3. (Emphasis added)
To the contrary, the testimony demonstrates that there was a conflict as to:

1) whether the pistols in question ever existed;
2) whether any such pistols came into the possession of the Sheriff's Department;
3) whether the state's sole witness on the issue was present at the time and place he claimed to have witnessed the theft;
4) whether the defendant was present at the time and place at which he was accused of having stolen the weapons; and,
5) ultimately, whether the defendant had "obtained and exerted control" over the pistols.

2. Whether evidence is uncontradicted, State v. Urbaytis, supra at 277.

3. Whether a witness was impeached, State v. Urbaytis, supra at 277.

4. Consideration of what was not proved, Cole v. McClure (1913) 88 Ohio St. 1, 14.

5. The certainty of the evidence, Cole v. McClure, supra.

6. The reliability of the evidence, Cole v. McClure, supra.

7. The extent to which any of the witnesses may have an interest to advance or protect by their testimony, Cole v. McClure, supra, and

8. The extent to which the evidence is vague, uncertain, conflicting, fragmentary, or not fitting together in a logical pattern. Cole v. McClure, supra at 17.

Upon this record, I am persuaded that the verdict of guilty is against the weight of the evidence, and for that reason the conviction of defendant-appellant should be reversed.

C.

In reaching the conclusion that the verdict is against the weight of the evidence, I have sought to scrupulously adhere to the standard for review as set forth by the Ohio Supreme Court, State v. Robinson, supra. However, I should also indicate that there is good reason to believe that we are not even limited to the weight of the evidence standard in this case, and that, if it desires to, the Court may look

into the record and determine for itself the true state of the evidence.

It will be remembered that the trial court instructed the jury that it could return a verdict of guilty upon this count only if it found that the weapons were stolen from property "lawfully seized" by the Sheriff's Department. (T. 1285) Further, the jury was instructed that:

> "Property lawfully seized by and in possession of the Cuyahoga County Sheriff's Department means property seized under a warrant of search and seizure, based upon probable cause, and possessed by the Sheriff for safe keeping." (T. 1291) 36/

The search warrant for 10001 Cedar Avenue authorized the Sheriff's Department to "diligently search...for contraband in the form of liquor, beer and wine and gambling equipment and paraphernalia..." (St. Ex. 1-D, T. 1305). Since the search warrant obviously did not authorize the seizure of any weapons, the instruction from the trial court required that a not guilty verdict be returned. By failing to return such a verdict, the jury violated the instructions of the trial court and their own oaths.

The effect of such a violation was set forth by Judge Corwin of the Ohio Supreme Court in which the jury had violated its oath, albeit upon a different matter:

> "The record before us shows a conduct very opposite to that required by

---

36/ No instruction was given indicating to the jury that property might be lawfully seized pursuant to an exigency to the warrant requirement.

such regulations; and, in a case of the least doubt, no verdict of a jury has or can have its usual and proper force and obligation with the court..." Farrer v. State (1853) 2 Ohio St. 47, 52.

Because of such misconduct, the court was "free to look into the facts...Farrer v. State, supra at 53. In cases such as the one at bar, where in my opinion it is beyond dispute that the jury has violated its oath and has not followed the instructions of the trial court upon determining issues of guilt and innocence, I believe that the verdict is no longer to be accorded deferential treatment and that a reviewing court is free to make a thorough inquiry into the status of the record.

IV

In his final assignment of error, the appellant claims that he was entitled to a judgment of acquittal on the charge of intimidating Deputy Campbell. For the reasons set forth below, I find merit in this assignment of error.

The State's theory of the case upon the charge of intimidation was that on August 2, 1975, when Deputy Trainee Campbell, his wife, and Deputy Vari met with the defendant at the Eastown Motel, the defendant made a threat against Campbell, a public servant, and thereby attempted to intimidate or hinder him in the discharge of his duty. 37/ The

37/ Ohio Revised Code Section 2921.03 provides that:

"No person, knowingly and by force or by unlawful threat of harm, shall attempt to influence, intimidate, or hinder a public servant, party official, or witness in the discharge of his duty."

facts relevant to this incident are as follows:

According to Mr. Campbell, he received a call from the defendant on August 1, 1975 saying that the defendant wanted to talk with Campbell and asking him and his wife to come out to the Eastown Motel where the defendant apparently worked. (T. 113) In what was evidently an attempt to give Mr. Campbell some incentive to meet with him, Major Payne told Campbell that the Motel would have a band playing in the bar; that Phillip Vari, Campbell's partner would also be there; and that it was "urgent" for Payne to talk with Campbell. (T. 113, 223-224) 38/ In spite of the claimed urgency, Payne did not ask Campbell to come to Eastown until the next evening, which was a Saturday. (T. 418) Campbell agreed to meet him there at that time. (T. 113)

Mr. and Mrs. Campbell, along with Phillip Vari, arrived at the Eastown at approximately 9:00 o'clock on the evening of August 2, 1975. They stayed there for almost three hours, listening to the band, engaging in social conversation, and having drinks with one another. (T. 115-116; 228) Some rounds of drinks were purchased by the defendant, others by Mr. Campbell. (T. 472) According to Mr. Campbell, he never did ask Major Payne what he wanted to see him about because Campbell believed that Payne would bring the matter up and also because Campbell was "enjoying" himself that evening. (T. 228) Mrs. Campbell testified that the evening was "very nice and pleasant in the beginning." (T. 421) because the motel had a "nice lounge" and the music was "very

38/ Similar statements were made in inviting Deputy Vari to be present. (T. 469)

good". (T. 426)

According to the three state's witnesses, Mr. Campbell, Mrs. Campbell, and Deputy Vari, in the later part of the evening the conversation turned to the "reports" that Mr. Campbell had in his possession. These "reports" were constantly referred to throughout the trial, but nowhere is their exact contents revealed nor is there anything but confusion as to the nature of the reports. At times it appears from the testimony that the reports were nothing more than extra copies of reports which Campbell had already turned in to the Sheriff. (T. 117, 230, 424, 492-493) At other times it appears that these "reports" also refer to Campbell's private notes concerning "irregularities" within the Sheriff's Department. (T. 111, 182, 187) The only evidence before us that any of these documents contained any information concerning illegal activities, is Campbell's own testimony that he made certain notes concerning the alleged theft of the two weapons by the defendant. (T. 187) However, there is no evidence in the record indicating that Major Payne ever learned the contents of any of Mr. Campbell's documents, or, prior to his own indictment, had any reason to believe that Mr. Campbell had any information which could implicate him in any criminal activity.

On the night at the Eastown Motel, it appears that Campbell did tell the defendant that he had reports upon the activities of the defendant and Sheriff Kreiger, (T. 423) but never told him the contents of the reports concerning the defendant. (T. 456, 597) Reaction of defendant Payne to Campbell's statement that he had reports concerning Payne's activities seemed to have been one of indifference. Rather, Payne's interest appeared to have been in

the reports that pertained to Sheriff Kreiger. 39/

Payne attempted to persuade Campbell to give him the reports, but was unsuccessful. By all accounts he told Campbell that he would "take care of him", if he gave the reports to Payne. (T. 424, 475)

39/

Mr. Campbell: "He asked me what I intended to do with those copies about Sheriff Ralph Kreiger..."(T. 117)

"He asked me did I think he [Payne] could be sheriff..." (T. 117)

"He asked me if he could be sheriff, if I had enough to get Sheriff Kreiger out of office and if he could be sheriff." (T. 118)

"He also asked both Phillip Vari and myself and my wife if we thought he could carry a white vote..." (T. 118)

"He asked me if I had any copies of my reports about Sheriff Kreiger to get him out of office, if I was planning on going to court and get him prosecuted." (T. 230)

Mrs. Campbell: "Major Payne asked [Don Campbell] how serious was the information he had on Sheriff Kreiger..." (T. 423)

Phillip Vari: "He asked Don, 'What do you have on Sheriff Kreiger?' The way it came across to me, he wanted to know what could he have that could hurt Sheriff Kreiger but to help him." (T. 173)

What happened next is a matter upon which there is some disagreement. According to Deputy Vari, Major Payne said,

"If you do take this to court, you won't make it." (T. 475) 40/ On the other hand, both Mr. and Mrs. Campbell testified that Major Payne said:

"If you don't give me the reports, I'll make sure you never get to court with them." (T. 425, 119)

When Campbell left for the evening he still was refusing to turn the reports over to the defendant. When the Campbells and Vari left the Eastown, they passed Marion Koszewski who said that Campbell was either shaking hands with or had his arms around Major Payne. (T. 997)

I agree with the majority that even though Campbell was on disability leave, he was still a public servant and he still owed certain duties to the public as a result of his position as a trainee for the position of deputy sheriff. I also agreed that Campbell was under a duty to report "any illegalities that he observed by virtue of his office", Journal Entry & Opinion at 13, though I would express the nature of that duty somewhat differently. 41/ But I would hold that though there

---

40/ At other places in the record Vari testified:
"You'll never make it to court." (T. 476)
"He said to him, 'You won't make it to court.' he made a statement about that, 'You'll never make it to court.'" (T. 498)
See also T. 498.

41/ Under Ohio law the Sheriff is the Chief Law Enforcement officer for the county.

may be criminal conduct there is no evidence that Major Payne "knowingly" made an attempt to influence or intimidate Trainee Campbell in the performance of his duty to report illegal activities. As far as the record before us is concerned, Payne had no knowledge that Campbell knew of any illegal activity and consequently that Campbell had anything to report. Further, the uncontradicted evidence of the state's own witnesses suggest that the real interest of defendant Payne lie not in suppressing evidence about himself, but in obtaining information about Sheriff Kreiger.

It should also be noted that if Campbell's version of the statement allegedly made by Payne is credited, then it may be properly inferred that Payne threatened to do Campbell bodily harm unless he turned over the reports in question. 42/ This alone could certainly

---

As such he and his assistants have a duty to enforce the law. This duty requires that the Sheriff, or his Deputy, arrest an offender when they have the means to do so. However, when they are unable to effect any such arrest, then there is a duty to report the matter to their superior or some other responsible person capable of enforcing the law. Thus understood, the duty to report a crime is simply a lesser included part of the larger duty of enforcing the law.

42/ Of course if Vari's version is credited, it may be that Payne was not making any threat at all but simply balancing his offer to "take care of" Campbell with his own estimation that there were others who would try to stop Campbell and that Campbell was incapable of using the information properly without Payne's help.

be grounds for criminal action for menacing or aggravated menacing. See R.C. 2903.21; 2903.22. But nowhere was there any indication that Payne was attempting to prevent Campbell from being a witness, from testifying truthfully, or from reporting any criminal activity. Because the State has failed to show any logical nexus between the possible threat and any official duty of Campbell, I find that the "no evidence" rule applies and that judgment must be reversed.

IN THE SUPREME COURT OF OHIO

CASE NO. _____

Appeal from the Court of Appeals
for the Eighth Appellate District

STATE OF OHIO,
Plaintiff-Appellee,

-vs-

MAJOR EDWARD PAYNE,
Defendant-Appellant.

APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

BERNARD A. BERKMAN
J. MICHAEL MURRAY
BERKMAN, GORDON, KANCELBAUM and LEVY
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245

JAMES R. WILLIS
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
(216) 523-1100

Attorneys for Defendant-Appellant

JOHN T. CORRIGAN
Cuyahoga County Prosecutor
Justice Center
1200 Ontario Street
Cleveland, Ohio 44114
(216) 623-7800

Attorney for Plaintiff-Appellee

* * *

Proposition of Law No. I(A)

The Affirmance Of A Conviction Notwithstanding The Absence Of Evidence To Prove A Material Allegation Of The Indictment, Which Material Allegation Was Included As One Of The Essential Elements Of The Crime In The Trial Court's Instructions To The Jury, With No Objection By The State, On The Ground That It Had Been Unnecessary For The State To Allege And Attempt To Prove Such Element, Deprives The Defendant Of His State And Federal Constitutional Rights To Be Informed Of The Charge Against Him And To Due Process.

Until Major Payne's appeal was heard in the court below, he was led to believe by the State of Ohio that a valid conviction could be obtained against him only if the State could introduce evidence sufficient to enable reasonable minds to conclude beyond a reasonable doubt that the two pearl-handled guns allegedly taken by him had been lawfully seized by the Sheriff's Department. That is what the indictment alleged; that is what the Bill of Particulars contained; that is what the prosecutor promised the jury he would prove; that is what the trial court instructed the jury, without objection by the State, that it was required to find beyond a reasonable doubt before it could convict; and that is what the jury, by the verdict form it signed, represented it had in fact found beyond a reasonable doubt. It was only when the Court of Appeals rendered its decision, in

which it held that it had been wholly unnecessary for the State to attempt to prove the allegation of lawful seizure, that the appellant was informed that he had been misled by all of the affirmative actions of the State enumerated above.

The Sixth Amendment to the federal constitution, made applicable to the states by way of the Fourteenth Amendment, Faretta v. California, 422 U.S. 806 (1975), provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation...."

This same right is guaranteed by Article I, Section 10, of the Ohio Constitution. These provisions entitle an accused to fair notice of the specific charge against which he must defend, and entitle him to a charging instrument which is not misleading, but is sufficiently certain, unambiguous and precise to enable him to prepare a meaningful defense and avoid surprise. Russell v. United States, 369 U.S. 749 (1962); DuBrul v. State, 80 Ohio St. 52 (1909); Watson v. Jago, 558 F. 2d 330 (6th Cir. 1977); Hallman v. United States, 208 F. 2d 825 (D.C. Cir. 1953). See also, State v. Burgun, 49 Ohio App. 2d 112 (Cuy. County 1976). In the present case, that fundamental right was denied appellant when the Court of Appeals ruled that the State had not been required to prove what the State time and again represented to the appellant it would prove.

The United States Supreme Court's decision in Cole v. Arkansas, 333 U.S. 196 (1948), is instructive on this issue. There the petitioners had been convicted under a

provision of an Act of the Arkansas legislature which prohibited the promotion or encouragement of any unlawful assemblage at or near a labor dispute. In the trial court the case had been tried as an offense under that provision of the Act, and the jury had been instructed under that provision of the Act. The State Supreme Court upheld the convictions, however, without considering the defendants' attacks on the constitutionality of that particular provision of the Act, by holding that the conviction could be sustained under another provision of the same Act, which prohibited the use of force or violence to prevent any person from engaging in any lawful vocation. The State Supreme Court reasoned that it could uphold the convictions on this basis because the information pursuant to which the defendants had been charged included an allegation that the defendants had used force or violence to prevent an individual from working. The United States Supreme Court reversed, holding that the affirmance of petitioners' convictions under a different provision from the one under which they had been charged violated the most fundamental principles of due process--the rights of an accused to be informed of the specific charge against him and to have the opportunity to be heard in a trial of the issues raised by that charge. At 333 U.S. 202, the Court stated:

> "...To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court."

Similar concerns caused the United States Supreme Court to reverse petitioner's convictions in Russell v. United States, supra, on the ground that the indictments that had been returned against the petitioners failed to apprise them with sufficient particularity of the charges against which they were required to defend. At 369 U.S. 766, the Court stated:

> "The vice which inheres in the failure of an indictment under 2 U.S.C. §192, 2 U.S.C.A. §192 to identify the subject under inquiry is thus the violation of the basic principle 'that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him,***.' United States v. Simmons, supra, 96 U.S. at 362. A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. The Court has had occasion before now to condemn just such a practice in a quite different factual setting. Cole v. Arkansas, 333 U.S. 196, 201-202, 68 S.Ct. 514, 517, 92 L.Ed. 644." (Emphasis added).

The instant case is of the same vintage. The Court of Appeals, by its affirmance, excused the State's failure to prove a material allegation of the indictment, which the trial court identified to the

jury as an essential element of the crime charged, by altering the charge brought against the appellant after the verdict had already been returned. As Judge Jackson noted in his dissenting opinion below, at p. 14, "In circumstances such as these, where the State failed to give the accused proper notice of what it did ultimately prove, and failed to prove what it gave the accused notice of,...Constitutional provisions of this state and the nation require reversal."[14]

[14] The Court of Appeals' affirmance of the appellant's conviction in this fashion is also subject to attack under the Double Jeopardy Clauses of the state and federal constitutions. In order to satisfy constitutional requirements, a charging instrument must be sufficiently definite to demonstrate with accuracy the extent to which a defendant may plead a former acquittal or conviction in the event any proceedings are later instituted against the defendant for a similar offense. Russell v. United States, supra. When the Court of Appeals alters the elements of the charge after conviction, however, the original charging instrument no longer fulfills this constitutional mandate, and the defendant may well be exposed to jeopardy again. See Price v. State, 19 Ohio 422 (1850); and see dissenting opinion of Judge Jackson, below, at p. 14, fn. 11. Furthermore, when the Court of Appeals alters the charge against the defendant after conviction, this deprives the defendant of his right, guaranteed by Art. I, Sec. 10 of the Ohio Constitution, not to be held to answer for an infamous crime except on an indictment of a grand jury. In the instant case, the Court of Appeals has imposed criminal liability upon the appellant for a charge which was never returned by any grand jury.

* * *

Proposition Of Law No. II:

IT IS PREJUDICIAL ERROR TO ADMIT, OVER OBJECTION, ORAL TESTIMONY OF THE CONTENTS OF AN OUT-OF-COURT WRITTEN STATEMENT OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED IN THE WRITTEN STATEMENT.

Proposition of Law No. II(A):

Such Testimony Is Inadmissible Under The Hearsay Rule.

Proposition of Law No. II(B):

The Admission Of Such Testimony In The Absence Of The Declarant Deprives A Defendant Of His Right, Guaranteed By The Sixth And Fourteenth Amendments, To Confront The Witnesses Against Him.

Donald Campbell, the only witness who testified that Major Payne carried two pearl-handled firearms out of the fourth-floor office of Division 4, stated that the guns were in plastic bags when he observed them in Division 4 on April 19, 1975 (Tr. 29). He further testified that inside the bags along with the guns were tags which had markings on them (Tr. 29). Over defense objection, the following testimony was elicited from Campbell:

"Q. Was there any address noted on the markings of the evidence bag?

"A. 10001 Cedar Avenue." (Tr. 29).

This testimony was extremely vital, as it was by far the most important testimony in the entire case on the issue of whether or not the pearl-handled guns had been seized by the Sheriff's Department at the Cedar Avenue raid.

The testimony of Donald Campbell, admitted over the appellant's objection, was a textbook example of hearsay--testimony of a witness concerning an out-of-court statement offered to prove the truth of the matter asserted in the statement. Potter v. Baker, 162 Ohio St. 488 (1955). The fact that the statement about which Campbell testified was written as opposed to oral does not alter its hearsay character. See Westinghouse El. Corp. v. Dolly Madison L. & F. Corp., 43 Ohio St. 2d 122 (1975). Campbell, who himself had not participated in the Cedar raid, in essence testified that someone, whom he did not identify, made an out-of-court written statement that the two pearl-handled firearms had come from 10001 Cedar Avenue. The only purpose for which Campbell's testimony could have been offered was to prove the truth of the matter asserted in that statement. Accordingly, Campbell's testimony was hearsay and should have been excluded.

Furthermore, not only did Campbell's testimony violate the hearsay rule, but, under the circumstances of this case, its admission into evidence also denied the appellant his Sixth and Fourteenth Amendment right to confront the witnesses against him. The Confrontation Clause of the Sixth Amendment, made applicable to the states by way of the Due Process Clause of the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400 (1965), reads as follows:

> "In all criminal prosecutions the accused shall enjoy the right...to be confronted with the witnesses against him...."

At the core of this constitutional right is the guarantee that the accused will be afforded the opportunity to cross-examine the witnesses against him face to face in front of the jury chosen to pass upon his innocence or guilt. Barber v. Page, 390 U.S. 719 (1968); Bruton v. United States, 391 U.S. 123 (1968); Pointer v. Texas, supra. As the Court stated in California v. Green, 399 U.S. 149 at 161 (1970):

> "...We note that none of our decisions interpreting the Confrontation Clause requires excluding the out-of-court statements of a witness who is available and testifying at trial. The concern of most of our cases has been focused on precisely the opposite situation - situations where statements have been admitted in the absence of the declarant and without any chance to cross-examine him at trial...." (Emphasis added).

In the instant case, Donald Campbell was permitted to testify, over objection, as to an out-of-court written statement, made by an unidentified declarant, to the effect that the pearl handled firearms had come from the Cedar raid. Because the appellant never had the opportunity to confront and cross-examine the author of that crucial out-of-court written statement, the trial court's error in allowing that hearsay testimony to be heard and considered by the

jury was error of constitutional proportion under the Sixth and Fourteenth Amendments. Under these circumstances, Major Payne's convictions must be reversed unless it is shown that the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

In the Court of Appeals below, two of the three judges who sat on the panel which heard this case agreed with Major Payne's contention that Campbell's testimony constituted inadmissible hearsay which should have been excluded by the trial court. Only Judge Jackson, who dissented, however, found the error to be prejudicial. Judge Corrigan, in his concurring opinion, agreed that error had been committed, but concluded that it was harmless error.[15] Judge Corrigan's finding of harmless error was based on his agreement with Judge Patton, who wrote the opinion for the Court, that it had been unnecessary for the State to prove that the pearl-handled guns had been seized at the Cedar Avenue raid. The appellant submits that the Court of Appeals was grossly mistaken in arriving at this determination, and that, for several reasons, it was absolutely essential for the State to prove that the firearms had been seized at the Cedar raid.

---

[15] In arriving at this conclusion, Judge Corrigan found the error to be non-constitutional, and thus, subject to a less exacting standard of review.

First, it was essential for the State to link the guns to the Cedar raid in order to attempt to prove that Major Payne's purpose in removing the guns from the fourth-floor office of Division 4 was to convert them to his own use. In the absence of evidence linking the pearl handled guns to the Cedar raid, the State's case against Major Payne consists solely of the testimony of Donald Campbell that Major Payne carried out of the office of Division 4, located on the fourth floor of the County Jail Building (Tr. 511), two pearl-handled guns which had been in plastic bags. But, inasmuch as the appellant was the head of Division 4, the warden of the County Jail, and a Major in the Sheriff's office, it certainly was no crime for him to handle evidence in the Sheriff's custody, or to transport evidence in the Sheriff's custody from one room to another in the County Jail Building, or to perform any number of perfectly legitimate functions in the course of his official duties which would require him personally to carry evidence in the Sheriff's custody from one location to another. Compare State v. Kulig, supra.

There was no evidence at all to demonstrate what the appellant did with the pearl-handled guns or where he transported them after carrying them out of the fourth-floor office of Division 4. Therefore, the State was forced to introduce other evidence in its attempt to prove that Major Payne carried those guns out of the Division 4 office, not in connection with any legitimate official purpose he may have had, but for the purpose of converting those firearms to his own personal use.

To that end, the State introduced the testimony of Donald Campbell that it was the customary practice following a raid for Division 4 members to enter in the Sheriff's

property book, under a heading which includes the address of the place raided and the date of the raid, a complete list of each item seized on the raid (Tr. 56-59); and that it was also customary for Division 4 members to include a complete list of all items seized on a raid in the inventory to be returned with the search warrant which authorized the raid (Tr. 34-38). Campbell further testified that the two pearl-handled guns were not reflected in either the Sheriff's property book under the April 19th Cedar heading or in the inventory returned with the Cedar Avenue search warrant, as they should have been, had they been seized at the Cedar raid (Tr. 56-59; 34-38). From this evidence, the State urged that there was only one explanation for the failure of those two guns to appear in the property book and in the inventory. That explanation, at least under the State's view, was that when Major Payne carried those guns out of the fourth-floor office of Division 4, he intended to convert them to his own use and, consequently, did not want the existence of those guns and the fact that they had been seized at the Cedar raid to be documented.[16]

[16] The appellant submits that the conclusion urged by the State does not necessarily follow. The fact that Major Payne transported the guns out of the fourth-floor office of Division 4 before those guns were recorded in the inventory and property book does not prove that Major Payne intended to convert those guns to his own use, nor is it altogether inconsistent with his carrying those guns out of the office for a legitimate purpose in connection with his official duties. Indeed, appellant submits that there simply was not sufficient proof of his intent to convert the pearl-handled guns.

Thus, it was essential for the State to prove that the pearl-handled guns had been seized at the Cedar raid. If, in fact, those guns had been seized at a different raid, or had come into the Sheriff's possession by some means other than a raid, there would have been nothing sinister about the fact that those guns were not listed in the Sheriff's property book under the Cedar raid and nothing sinister about the fact that those guns were not included in the inventory returned with the Cedar Avenue search warrant. Had the guns been seized at a different raid, they may indeed have been entered in the property book under that other raid; had the guns come into possession of the Sheriff's Department by some means other than a raid (e.g., if the guns had been taken from persons brought into the County Jail), the guns legitimately would not have been entered in the property book at all, because that book contained entries only for items seized on raids conducted by Division 4 (Tr. 56). In either event, even under the State's view, Major Payne could have carried those guns out of the office of Division 4 without their having been recorded in the property book or in the inventory, for a wholly legitimate purpose in connection with his official duties.

It cannot be stressed enough that there was no proof that the guns were not listed in the Sheriff's property book under another raid; and that no proof was offered that after a diligent search of the County Jail building and after a diligent search through all of the property in possession of the Sheriff, it was discovered that the pearl-handled guns were missing or not among that property. The only evidence offered by the State to prove that Major Payne carried the guns out of the Division 4 office, not in connection with any legitimate official purpose he may have had, but for the purpose

of converting those firearms to his own personal use, was the fact that the guns were in a paper bag as opposed to the plastic bag and the fact that, under the State's view, if the guns had been seized at the Cedar raid, they would have been listed under that raid in the Sheriff's property book and would have been included in the inventory returned with the Cedar search warrant, if Major Payne's purpose in carrying them out of the office had been legitimate. Thus, the State had to link the guns to the Cedar raid.[17]

[17] The appellant submits that, even considering the improperly admitted testimony linking the pearl-handled guns to the Cedar raid, the evidence was insufficient to prove Major Payne's intent to convert the guns, and that this Court should reverse the appellant's conviction on this basis as well, just as this Court did in State v. Kulig, supra, under very similar circumstances. Just as in Kulig, all that the State has proven in this case, through Donald Campbell, is that Major Payne was in possession of the pearl-handled guns. Because the appellant was a Major in the Sheriff's Department, the warden of the County Jail, and the head of Division 4, proof of possession by him of the guns was equally as consistent with innocence as with guilt, mandating a reversal under the rule announced by this Court in State v. Kulig, supra.

It was also crucial for the State to link the guns to the Cedar raid in order to demonstrate that the guns had been seized by, and thus belonged to, the Sheriff's Department when the appellant carried them out of the Division 4 office. Certainly, the mere fact that the firearms were physically present in Division 4 does not establish that they belonged to the Department any more than proof of that same fact about the appellant's wallet would establish that the wallet belonged to the Department. In order to exclude the otherwise reasonable possibility that the guns belonged to Major Payne or to someone else who had given him permission to handle the weapons, it was essential for the State to prove that the guns had been seized at the Cedar raid by, and therefore belonged to, the Sheriff's Department.

Moreover, it was necessary for the State to prove that the pearl-handled guns had been seized at the Cedar raid in order at least to make an attempt (albeit unsuccessfully) to meet its burden of proving its allegation that the guns had been lawfully seized by the Sheriff's Department.

Finally, it was essential for the State to link the guns to the Cedar raid because that was the State's entire theory of the case, and the State could not reasonably expect the jury to convict the appellant without introducing evidence which would lend credence to the State's theory of the case.

Donald Campbell's hearsay testimony linking the pearl-handled guns to the Cedar raid was crucial, and its erroneous admission into evidence severely prejudiced the appellant, mandating a reversal of his conviction under any standard of review.

* * *

Proposition of Law No. III:

THE AFFIRMANCE OF A CONVICTION BASED ON AN ENTIRELY DIFFERENT THEORY OF THE CASE FROM THAT WHICH THE STATE ADVANCED IN THE TRIAL COURT TO SECURE THE CONVICTION DEPRIVES A DEFENDANT OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO BE INFORMED OF THE CHARGE AGAINST HIM AND TO DUE PROCESS.

Until the Court of Appeals announced its initial decision in this case on February 28, 1978, Major Payne had every legitimate reason to believe that his convictions could be upheld only if there was sufficient evidence in the record to show that the State had fulfilled the promises it had made to the jury in its opening statement that it would prove the following facts in support of its theory of the case beyond a reasonable doubt:

* * *

"The evidence will show that at this time an alternate site for a raid was decided upon, and that being 10001 Cedar Avenue in the City of Cleveland. There was a--no, there was not a search warrant for this particular address, but it was an alternate site for a raid on this particular occasion.

"The evidence will show that Major Payne, the defendant, and other employees of the Sheriff's Department did go out in the early morning hours of April 19th and did raid this establishment,

and made several arrests and seized many items of evidence, such as gambling paraphernalia, money, liquor, and some weapons.

"The evidence will show, ladies and gentlemen, that seized at this particular address were six handguns and one shotgun, a long one.

"The evidence will further show, ladies and gentlemen, that the items that were seized from that address were brought back by the Sheriff's personnel to the property room area of Division 4, the fourth floor of County Jail, where it was to be inventoried and entered into the property room to be held pending any court case.

"The evidence will further reflect, ladies and gentlemen, that on this occasion in the early morning hours of April 19, 1975, the defendant in this case, Major Payne, requested of Detective Garner who is an employee and along on the raid at the time, made a request for two 9-millimeter Browning firearms that had been seized at the raid on Cedar and were in the property room of Division 4 and as yet to be inventoried, and this request was made for these firearms for his own use.

"The evidence will further show that these two firearms were taken by Major Payne and he left the building with these two pistols.

"The evidence, ladies and gentlemen of the jury, will further reflect that the search warrant return that was filed and the inventory that was filed with the court and the property book that is filed and kept as a matter of record by the Sheriff's Department indicate that on this particular night in question, at this particular raid, there are entries for four handguns and one shotgun.

"The evidence will further show, ladies and gentlemen, that there is no entry made for the two 9-millimeter pistols, the Browning firearms, either on the inventory that was filed as a result of this raid or they do not appear in the evidence book kept by the Sheriff's Department."

* * *

"We, the State of Ohio, have the burden of proof and we accept that burden."

* * *

"We will further prove to you beyond a reasonable doubt that on or about April 19, 1975, in the County of Cuyahoga, Major Edward Payne unlawfully and purposely, while being a public official, used his office in the aid of committing a theft offense; that he knowingly and purposely obtained for his own

use two 9-millimeter firearms with pearl handles on same from property lawfully seized by and in the possession of the Cuyahoga County Sheriff's Department." (State's opening statement, Tr. 11-13; Tr. 19-20)(Emphasis added).

When the Court of Appeals rendered its decision, however, Major Payne was informed that he had been sadly mistaken. The Court upheld his conviction based on its determination that it had been altogether unnecessary for the State to prove that the pearl-handled firearms had been seized at the Cedar raid. See Judge Patton's opinion for the Court at p. 10, and the concurring opinion of Judge Corrigan, whose vote was necessary to sustain the conviction, at p. 2. By ruling that it was wholly unnecessary for the State to prove that the guns had been seized at the Cedar raid, and by ruling that it was wholly unnecessary for the State to prove that the seizure of those guns had been lawful, and, indeed, by effectively ruling that the State was not even required to prove that the guns had come into possession of the Sheriff's Department by means of a seizure at all, the Court of Appeals affirmed the appellant's convictions on the basis of an entirely different theory of the case from that upon which the State relied in the trial court to secure the convictions.

Since the filing of the indictment in this case on November 17, 1975, up until the February 28, 1978, decision of the Court of Appeals, the State, time and time again, has represented that its entire theory of this case was that a raid took

place on April 19th, 1975, at 10001 Cedar Avenue; that among the items lawfully seized at that raid were two pearl-handled firearms; that those firearms were transported to the Division 4 office immediately following that raid; that Major Payne removed from the office of Division 4 for his own use those particular firearms that had been seized at the Cedar raid; and that, in order to conceal his criminal activity, Major Payne removed those firearms before the existence of those firearms and the fact that they had been seized at the Cedar raid were recorded in writing either in the Sheriff's Property book under the April 19th Cedar raid or in the inventory to be returned with the Cedar search warrant.

Indeed, the issue of whether or not two pearl-handled guns had been seized at the Cedar raid was one of the most hotly contested issues in the entire trial. The State devoted a major part of its trial effort to an attempt to prove that two pearl-handled guns had been seized at Cedar. A major thrust of the defense at trial was that no pearl-handled firearms had ever been seized at the Cedar raid, and that the pearl-handled guns were, therefore, merely figments of Donald Campbell's imagination.

The appellant submits that, in the face of such a record, the Court of Appeals' determination that it had been unnecessary for the State to prove to the jury its entire theory of the case and its affirmance of appellant's convictions based on an entirely new theory of the case, a theory of which the appellant had never previously been apprised, have deprived him of his state and federal constitutional rights to be informed of the specific

charge against him and to due process of law. Just as the petitioners in Cole v. Arkansas, 333 U.S. 196 (1948), the appellant here was entitled, as a matter of due process of law, "...to have the validity of [his] convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." Id., at 333 U.S. 202. The appellant had a constitutional right to be afforded notice of the charge against him in terms sufficiently inelastic to preclude his conviction from resting on one point while the affirmance of that conviction rested on another. Russel v. United States, 369 U.S. 749, 766 (1962).

Relying on the State's repeated representations that it intended to obtain his conviction by proving that he had taken two guns which had been lawfully seized by the Sheriff's Department on April 19, 1975, during the course of a raid at 10001 Cedar Avenue, the appellant planned his trial strategy and built his central defense around his contention that no pearl-handled guns had ever been seized at the Cedar Avenue raid. The Court of Appeals' affirmance of his conviction on the entirely new and different theory that the State had not been required to link the pearl-handled guns to the Cedar raid was fundamentally unfair and violative of the

appellant's constitutional rights.[19] The decision of the Court of Appeals must, therefore, be reversed.

* * *

19/ Here, too, the Court of Appeals' affirmance in this manner is attackable under the Double Jeopardy Clause of the state and federal constitutions. By reason of the decision of the Court of Appeals, there is simply no way to ascertain whether the appellant was convicted of taking pearl-handled guns that had been seized at the Cedar Avenue raid or of taking an altogether different set of pearl-handled guns. The extent to which the appellant is protected from a new prosecution is, therefore, not clear. Nor is it clear whether the appellant now stands convicted of the same charge which was returned by the grand jury, a situation which violates the appellant's state constitutional right to a grand jury indictment.

Proposition of Law No. IV:

WHERE THE ALLEGED COMMISSION OF ONE OFFENSE SUPPLIES THE REASON AND MOTIVE FOR THE ALLEGED COMMISSION OF ANOTHER OFFENSE, A REVERSAL OF A CONVICTION ON THE FIRST OFFENSE CHARGED REQUIRES A REVERSAL OF A CONVICTION ON THE SECOND OFFENSE CHARGED.

In the foregoing pages of this brief, it has been demonstrated that the courts below committed a number of errors, each of which necessitates a reversal of the appellant's conviction of Theft in Office. The prejudicial effect of those errors, however, was not confined merely to the Theft in Office charge; those errors infected the process by which the appellant was convicted of Intimidation as well. The record affirmatively shows the prejudicial effect those errors had on the appellant with respect to the Intimidation conviction. Accordingly, that conviction should be reversed also. State v. Stanton, 15 Ohio St. 2d 215 (1968); State v. Call, 8 Ohio App. 2d 277 (1965).

The appellant's Intimidation conviction was based on a meeting which took place on August 2, 1975, at which the appellant, Donald Campbell, Judith Campbell and Phillip Vari were present (Tr. 114). During the course of that meeting, the appellant allegedly asked Donald Campbell to relinquish certain notes that Campbell had been keeping (Tr. 116). When Campbell refused to give up those notes, the appellant allegedly threatened him (Tr. 119). It was that threat which formed the basis of the appellant's conviction for Intimidation, and it was what Campbell's notes supposedly

contained that prompted the appellant to level that threat. The notes Campbell had been keeping concerned the irregularities he had observed in Division 4, including the removal by the appellant from Division 4 of the two pearl-handled firearms on April 19, 1975 (See Tr. 187, 111, 117).

The close connection between the Theft in Office conviction and the Intimidation conviction is, thus, immediately apparent. Once the jury made the determination that the appellant had, in fact, removed two pearl-handled guns for his own use from Division 4 on April 19, 1975, it was a far easier matter for it to conclude that the appellant had intimidated Donald Campbell on August 2, 1975. This is because once the jury became convinced that Donald Campbell had, in fact, seen the appellant remove from Division 4 two pearl-handled pistols that had been seized at the Cedar raid, it was a simple matter for the jury to conclude that this gave the appellant a reason to threaten Campbell on August 2, 1975. Remove that motive, however, and the jury may well have returned a different verdict on the Intimidation charge.

That being the case, clearly any error in the proceedings below which vitiates the Theft in Office conviction is an error which necessarily taints the Intimidation conviction. The applicable rule of law was stated succinctly by this Court in Hallworth v. Republic Steel Corp., 153 Ohio St. 349 at 358 (1950):

> "...In order to find that substantial justice has been done to the appellant so as to prevent a reversal of the judgment for errors occurring at the trial, the reviewing court must not only weigh the prejudicial

> effect of those errors but also determine that, if those errors had not occurred, the jury or other trier of facts would have made the same decision."

In the case at bar, it simply cannot be said with any degree of confidence that the jury would have returned the same verdict of guilty on the Intimidation charge, had the errors which necessitate a reversal of the Theft in Office conviction not occurred.[20/] The connecting link between the two convictions--motive--is just too strong to be broken. Therefore, a reversal of the appellant's conviction of Theft in Office, for any of the reasons set forth in this memorandum, must also result in a reversal of the appellant's conviction of Intimidation.

Furthermore, with respect to the constitutional errors detailed in the preceding pages, an even more exacting standard of review is required. In order to uphold the

---

20/ The fragility of the jury verdicts of guilty in this case is shown by the not guilty verdict returned by the same jury on the other charge of Theft in Office. Both charges of Theft in Office rested almost exclusively upon the uncorroborated testimony of Donald Campbell, whose story concerning both of those charges was nearly identical. The jury obviously found a substantial portion of Campbell's testimony not worthy of belief. In view of that fact, the appellant submits, any error in the proceedings below taints both of appellant's conviction. See Judge Jackson's dissent below, at pp. 33-36 for an insightful analysis of Donald Campbell's credibility.

appellant's Intimidation conviction in the face of these constitutional errors, it must be shown that, as to the appellant's Intimidation conviction, such errors were harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). That such errors were not harmless beyond a reasonable doubt is clear, and appellant's Intimidation conviction must, therefore, be reversed.

* * *

* * *

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO,	)	CASE NO. 36457
	)	
Plaintiff-Appellee,	)	
	)	
-vs-	)	
	)	MEMORANDUM IN
MAJOR EDWARD PAYNE,	)	SUPPORT OF APPEL-
	)	LANT'S APPLICATION
Defendant-Appellant.	)	FOR RECONSIDERATION

INTRODUCTION

In support of the second assignment of error raised by the appellant before this Court, the appellant argued that the testimony of Donald Campbell that the address 10001 Cedar Avenue was written on the property tag attached to the plastic bags containing the pearl-handled firearms allegedly converted by Major Payne was inadmissible hearsay. While a majority of this Court agreed with the appellant that it was error for the trial court to admit this hearsay testimony over the appellant's objection, only Judge Jackson found the error to be prejudicial and reversible. Judge Corrigan, in a concurring opinion, agreed that it was error for the trial court to admit the testimony, but held that the error was harmless. 1/

1/ Judge Patton, who wrote the majority opinion, disagreed with both Judge Corrigan and Judge Jackson, and found that Campbell's testimony was not hearsay.

Judge Corrigan's conclusion that the error was harmless was based upon two determinations made by him in his concurring opinion. First, Judge Corrigan determined that the error in admitting Donald Campbell's testimony was not of constitutional dimension. As a result, the question of whether the appellant was prejudiced by the error could be determined by the application of a standard far less exacting than the standard which must be applied in the case of constitutional error. 2/ Second, Judge Corrigan determined that the State's attempt to prove that the guns had been seized at the Cedar raid had been unnecessary to secure a conviction. Under this view, Judge Corrigan held, substantial evidence could be found in the record to support appellant's conviction, even disregarding the erroneously admitted evidence; consequently, the error could be regarded as harmless.

For the reasons that follow, the appellant submits that the admission of the hearsay testimony of Donald Campbell, under the circumstances of this case, was an error of constitutional dimension; and that, in fact, it was necessary for the State to prove that the pearl-handled firearms had been seized at the Cedar Avenue raid.

2/ In the case of constitutional error, a conviction must be reversed unless it is demonstrated that the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). In the case of non-constitutional error, this Court has held that a conviction may be affirmed if, disregarding the objectionable evidence, there is substantial evidence to support the conviction. State v. Davis, 44 Ohio App. 2d 335 (1975).

The appellant additionally submits that he has been denied his basic constitutional rights, by reason of the fact that his convictions have been affirmed by this Court on the basis of an entirely different theory of the case from that which the State relied upon to secure the appellant's convictions.

Accordingly, the appellant's application for reconsideration should be granted and his convictions reversed.

ARGUMENT

I. THE ERRONEOUS ADMISSION OF THE HEARSAY TESTIMONY OF DONALD CAMPBELL, UNDER THE CIRCUMSTANCES OF THIS CASE, WAS AN ERROR OF CONSTITUTIONAL PROPORTION IN THAT IT DEPRIVED THE APPELLANT OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO CONFRONT THE WITNESSES AGAINST HIM.

The Confrontation Clause of the Sixth Amendment, made applicable to the States by way of the Due Process Clause of the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400 (1965), reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him...."

At the core of this constitutional right is the guarantee that the accused will be afforded the opportunity to cross-examine the witnesses against him face to face in front of the jury chosen to pass upon his

innocence or guilt. Barber v. Page, 390 U.S. 719 (1968); Bruton v. United States, 391 U.S. 123 (1968); Pointer v. Texas, supra. As the Court stated in California v. Green, 399 U.S. 149 at 161 (1970):

> "...We note that none of our decisions interpreting the Confrontation Clause requires excluding the out-of-court statements of a witness who is available and testifying at trial. The concern of most of our cases has been focused on precisely the opposite situation - situations where statements have been admitted in the absence of the declarant and without any chance to cross-examine him at trial...." (Emphasis added).

In the instant case, Donald Campbell was permitted to testify, over objection, as to an out of court written statement, made by an unidentified declarant, to the effect that the pearl-handled firearms had come from the Cedar Avenue raid. Because this testimony was offered to prove the truth of the declarant's statement, it was inadmissible hearsay. Potter v. Baker, 162 Ohio St. 488 (1955). Furthermore, because the defendant never had the opportunity to confront and cross-examine the author of that out of court written statement, the trial court's error in allowing that hearsay testimony to be heard and considered by the jury was error of constitutional proportion under the Sixth and Fourteenth Amendments.

Under these circumstances, the appellant's convictions must be reversed

unless it is determined that the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). In determining whether constitutional error committed in a trial court is harmless beyond a reasonable doubt, this Court has held that the test is whether or not there is overwhelming evidence of the defendant's guilt. State v. Davis, 44 Ohio App. 2d 335 (1975). The appellant here doubts that even the State would urge that the evidence of his guilt was overwhelming. Clearly, it was not. Accordingly, his convictions should be reversed.

* * *

III. THE AFFIRMANCE OF THE APPELLANT'S CONVICTIONS ON THE BASIS OF AN ENTIRELY DIFFERENT THEORY OF THE CASE FROM THAT WHICH THE STATE RELIED UPON TO SECURE THE CONVICTIONS IN THE TRIAL COURT DEPRIVES THE APPELLANT OF HIS CONSTITUTIONAL RIGHTS.

As Judge Jackson so cogently and persuasively demonstrated in his dissenting opinion, Major Edward Payne, until this Court announced its decision on February 28, 1978, had every legitimate reason to believe that his conviction could be upheld only if there was sufficient evidence in the record to show that the State fulfilled the promises it made to the jury in its opening statement that it would prove the following facts in support of its theory of the case beyond a reasonable doubt:

* * *

"The evidence will show that at this time an alternate site for a raid was decided upon, and that being 10001 Cedar Avenue in the City of Cleveland. There was a--no, there was not a search warrant for this particular address, but it was an alternate site for a raid on this particular occasion.

"The evidence will show that Major Payne, the defendant, and other employees of the Sheriff's Department did go out in the early morning hours of April 19th and did raid this establishment, and made several arrests and seized many items of evidence, such as gambling paraphernalia, money, liquor, and some weapons.

"The evidence will show, ladies and gentlemen, that seized at this particular address were six handguns and one shotgun, a long one.

"The evidence will further show, ladies and gentlemen, that the items that were seized from that address were brought back by the Sheriff's personnel to the property room area of Division 4, the fourth floor of County Jail, where it was to be inventoried and entered into the property room to be held pending any court case.

"The evidence will further reflect, ladies and gentlemen, that on this occasion in the early morning hours of April 19, 1975, the defendant in this

case, Major Payne, requested of Detective Garner, who is an employee and along on the raid at the time, made a request for two 9-millimeter Browning firearms that had been seized at the raid on Cedar and were in the property room of Division 4 and as yet to be inventoried, and this request was made for these firearms for his own use.

"The evidence will further show that these two firearms were taken by Major Payne and he left the building with these two pistols.

"The evidence, ladies and gentlemen of the jury, will further reflect that the search warrant return that was filed and the inventory that was filed with the court and the property book that is filed and kept as a matter of record by the Sheriff's Department indicate that on this particular night in question, at this particular raid, there are entries for four handguns and one shotgun.

"The evidence will further show, ladies and gentlemen, that there is no entry made for the two 9-millimeter pistols, the Browning firearms, either on the inventory that was filed as a result of this raid or they do not appear in the evidence book kept by the Sheriff's Department."

* * *

"We, the State of Ohio, have the burden of proof and we accept that burden."

* * *

"We will further prove to you beyond a reasonable doubt that on or about April 19, 1975, in the County of Cuyahoga, Major Edward Payne unlawfully and purposely, while being a public official, used his office in the aid of committing a theft offense; that he knowingly and purposely obtained for his own use two 9-millimeter firearms with pearl handles on same from property lawfully seized by and in the possession of the Cuyahoga County Sheriff's Department." (State's opening statement, Tr. 11-13; Tr. 19-20)(Emphasis added).

Since the filing of the indictment in this case on November 17, 1975, up until the February 28, 1978, decision of this Court, the State, time and time again, has represented that its entire theory of this case was that a raid took place on April 19th, 1975, at 10001 Cedar Avenue; that among the items lawfully seized at that raid were two pearl-handled firearms; that those firearms were brought back to the Division 4 office immediately following that raid; that Major Payne removed from the office of Division 4 those particular firearms brought back from the Cedar raid for his own use; and that in order to conceal his criminal activity, Major Payne removed those firearms before the existence of those firearms and the fact that they were seized at the Cedar raid was recorded in writing either in the Sheriff's Property book under the April 19th Cedar Avenue raid heading or in the inventory

to be returned with the Cedar Avenue search warrant.

The appellant submits that, in the face of such a record, it simply cannot reasonably be maintained that it was unnecessary for the State to prove to the jury its entire theory of the case; it simply cannot reasonably be maintained that it was harmless error for the trial court erroneously to admit the most crucial piece of evidence to link the guns to the Cedar raid and to support the State's entire theory of the case; and that it is fundamentally unfair and constitutionally intolerable to permit the State to alter its entire theory of the case at this stage of the proceedings. Compare Cole v. Arkansas, 333 U.S. 196 (1948); Russell v. United States, 369 U.S. 749 (1962).

However, this Court's February 28, 1978, decision has had precisely that effect. By ruling that it was wholly unnecessary for the State to prove that the guns had been seized at the Cedar raid, and by ruling that it was wholly unnecessary for the State to prove that the seizure of those guns was lawful, and, indeed, by effectively ruling that the State was not even required to prove that the guns came into the possession of the Sheriff's Department by means of a seizure at all, the Court has affirmed the appellant's convictions on the basis of an entirely different theory of the case from that which the State relied upon in the trial court to secure the convictions in the first place. The result is that the appellant has been deprived of his fundamental constitutional rights. Compare Cole v. Arkansas, supra; Russell v. United

States, supra; and see dissenting opinion of Judge Jackson in the instant case.

Accordingly, for this additional reason, the Court should reconsider its decision and reverse the appellant's convictions.

* * *

Supreme Court, U.S.
FILED
JAN 15 1979
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1978

No. 78-900

MAJOR EDWARD PAYNE,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*

EDWARD M. WALSH
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario
Cleveland, Ohio 44113
(216) 623-7807
Attorneys for Respondent

BERNARD A. BERKMAN
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245

JAMES R. WILLIS
1212 Bond Court Building
Cleveland, Ohio 44114
(216) 523-1100
Attorneys for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

Objections to Jurisdiction 1
Counter Questions of Law 2
Statement of the Case 3
Reasons for Denying the Writ 17

1. Where an indictment for theft in office contains all of the elements of the offense plus an additional material allegation of fact, and the trial court instructs the jury that the additional material allegation of fact is one of the essential elements of the offense which must be proven beyond a reasonable doubt, and the jury returns a guilty verdict on all of the elements of that offense plus the material fact allegation, the defendant's Sixth and Fourteenth Amendment rights are not violated where he was sufficiently apprised of the specific charges which he must defend by an indictment which was not misleading, was unambiguous and precise in that it enabled him to prepare a meaningful defense and avoid surprise 17
2. An affirmance of a conviction for theft in office by a state appellate court on the ground that the state was not required to prove a material allegation of fact in the indictment where it has proved all of the essential elements of the crime charged beyond a reasonable doubt, conforms to due process of law, as the validity of petitioner's conviction was appraised on consideration of the case as it was tried and as the issues were determined in the trial court, and petitioner was

fairly informed of the specific charges to which he had the opportunity to fully defend 20

3. Testimony concerning the contents of a property tag placed on a piece of evidence is admissible as an exception to the hearsay rule concerning inscribed chattels if the trial court, exercising sound discretion, determines that the testimony of the witness can be substituted for the inscribed chattel itself 22

Conclusion 23

TABLE OF AUTHORITIES

Cases

Cole v. Arkansas, 333 U.S. 196 (1948) 18, 19
DeJonge v. Oregon, 299 U.S. 353, 81 L. Ed. 278, 57 S. Ct. 255 19
Faretta v. California, 422 U.S. 806 (1975) 18
Groppi v. Leslie, 404 U.S. 496, 30 L. Ed. 2d 632 21
Russell v. United States, 369 U.S. 749 (1912) 18, 20

Constitutional Provisions and Statutes

Ohio Rev. Code, §2921.03 3
Ohio Rev. Code, §2921.41 3
U. S. Const., amend. VI 2, 17
U. S. Const., amend. XIV 2, 17, 19

Supreme Court of the United States

October Term, 1978

No. 78-900

MAJOR EDWARD PAYNE,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Court to review this case.

The questions presented herein were raised in the Court of Appeals for Cuyahoga County, Ohio and the Supreme Court of Ohio. The jury in the trial court found the petitioner guilty of theft in office and intimidation. The Court of Appeals affirmed the judgment of conviction. The Supreme Court of Ohio dismissed the petitioner's appeal for the reason that no substantial constitutional question existed.

The Ohio courts decided this case in accordance with the statutes and Constitution of the State of Ohio, the Constitution of the United States and the applicable decisions of this Court. There is therefore no substantial federal question presented by the petition for certiorari.

COUNTER QUESTIONS OF LAW

1. Where an indictment for theft in office contains all of the elements of the offense plus an additional material allegation of fact, and the trial court instructs the jury that the additional material allegation of fact is one of the essential elements of the offense which must be proven beyond a reasonable doubt, and the jury returns a guilty verdict on all of the elements of that offense plus the material fact allegation, the petitioner's Sixth and Fourteenth Amendment rights are not violated where he was sufficiently apprised of the specific charges which he must defend by an indictment which was not misleading, was unambiguous and precise in that it enabled him to prepare a meaningful defense and avoid surprise.

2. An affirmance of a conviction for theft in office by a state appellate court on the ground that the state was not required to prove a material allegation of fact in the indictment where it has proved all of the essential elements of the crime charged beyond a reasonable doubt, conforms to due process of law, as the validity of petitioner's conviction was appraised on consideration of the case as it was tried and as the issues were determined in the trial court, and petitioner was fairly informed of the specific charges to which he had the opportunity to fully defend.

3. Testimony concerning the contents of a property tag placed on a piece of evidence is admissible as an exception to the hearsay rule concerning inscribed chattels if the trial court, exercising sound discretion, determines that the testimony of the witness can be substituted for the inscribed chattel itself.

STATEMENT OF THE CASE

On November 17, 1975, Major Edward Payne, the petitioner, was indicted by the grand jury of Cuyahoga County, Ohio, on two counts of Theft in Office, under Ohio Rev. Code §2921.41, and two counts of Intimidation, under Ohio Rev. Code §2921.03. A jury trial held in the Court of Common Pleas of Cuyahoga County, Ohio, in February, 1976, resulted in petitioner's conviction on one count of Theft in Office, which count had charged him with having ". . . obtained for his own use two 9-millimeter firearms, with pearl handles, from property lawfully seized by and in the possession of the Cuyahoga County Sheriff's Department," and on one count of Intimidation, which count had charged the petitioner with intimidation of Donald Campbell, a public servant, in the discharge of his duty. Judgment of acquittal was entered by the trial court on the other charge of Intimidation, and the jury acquitted the petitioner on the other charge of Theft in Office. The trial court imposed prison sentences of two to ten years and three to ten years upon the petitioner for his convictions, the sentences to run concurrently.

On appeal, the petitioner's convictions were affirmed by a divided Court of Appeals for the Eighth Appellate District, Cuyahoga County, Ohio. The petitioner's subsequent application for reconsideration was denied by that court on March 21, 1978. Thereafter, on July 6, 1978, the petitioner's appeal as of right to the Ohio Supreme Court was dismissed on the ground that no substantial constitu-

tional question was presented. At the same time, that court overruled the petitioner's motion for leave to appeal. Major Payne's petition for rehearing was denied by the Ohio Supreme Court on September 7, 1978.

Donald W. Campbell, age thirty-two, and the father of two girls, was employed by the Cuyahoga County Sheriff's Department beginning January 13, 1975. His prior experience in law enforcement included positions as a Rocky River Police Officer, an Officer of the Richmond, California Police Department, and he was also a private investigator in the State of Arizona. Shortly after becoming employed by the Cuyahoga County Sheriff's Department, Campbell was chosen by petitioner, Major Edward Payne, to be one of the select members of Division 4, an undercover unit headed by Major Payne (R. 23). Division 4 specialized in using undercover deputies and informants in pursuit of illegal gambling, prostitution, narcotics and illegal liquor operations. (Defense witnesses testified that Division 4's purpose was to seek out those wanted on county capiases.)

On April 19, 1975 members of Division 4 of the Cuyahoga County Sheriff's Department, armed with a search warrant, conducted a raid at 10001 Cedar Avenue in the City of Cleveland, Ohio (R. 25). The Cedar raid was a back-up raid to an earlier visit to a west side cheat spot which was subsequently cancelled. Although Campbell attended the earlier attempted raid, he remained at Division 4 headquarters during the raid on Cedar. He worked on his duty reports at Division 4 headquarters until the raiding party returned from Cedar Avenue, at approximately 6:00 a.m. (R. 27). At this time Campbell observed evidence brought into Division 4 headquarters from the Cedar Avenue raid. This evidence consisted of liquor, gambling paraphernalia and firearms (R. 27, 28). Among

the firearms he observed that were brought in from the Cedar raid, were two 9 millimeter pistols, nickel plated with pearl handles. He observed these and other handguns in clear plastic evidence bags bearing yellow evidence tags (R. 29, 30). He observed the yellow tags on the 9 millimeter pistols bearing the address "10001 Cedar". Campbell further observed Detective Hosea Garner, at petitioner's request, placing these two 9 millimeter pistols in a brown bag, hand them to petitioner, whereupon petitioner removed the bag from the office of Division 4 (R. 32). Upon examining the office property book of Division 4 (State's Exhibit 2), Campbell described four pistols and one shotgun placed therein (R. 59). Needless to say, the two 9 millimeter pistols were not entered in State's Exhibit 2.

In later April or early May, Campbell made several visits to a cheat spot operated by Frank Sumpter located at 8416 Hough Avenue in the City of Cleveland. He gained entrance to this establishment because he was accompanied by a black informant named Sims Goodman, Jr. (R. 60). During these visits Campbell observed illegal gambling, drugs and prostitution (R. 62). A county search warrant was obtained and the Sumpter establishment was raided by Division 4 under the leadership of petitioner on May 9, 1975 (R. 62). Among the evidence seized at this raid was narcotics, firearms, clothing, stereo equipment and money (R. 68, 69). After this evidence was returned to Division 4 headquarters, an inventory was conducted that evening (R. 71). Deputy Campbell observed Deputy Garner place $250 in cash on Major Payne's desk, saying, "This is for the Major's expenses." (R. 79-80). Campbell had the opportunity to xerox the $250 in cash money before he observed petitioner put the cash in his pocket and leave Division 4 for the night (R. 81).

During the months of June and July, 1975, Campbell worked undercover with Deputy Phillip Vari, conducting his duties for Division 4 under the direction of Major Payne (R. 100). Campbell and Vari would report their nightly activities and location to petitioner at the East Town Motel which petitioner operated. Although dissatisfied with the operation of Division 4 and attempting to transfer out of Division 4 on two occasions in May and once in June, Campbell was ordered to remain in that capacity (R. 102).

On July 3, 1975, in company with Deputy Phillip Vari, while in the process of making a narcotic buy at the Mad Hatter Lounge on East 18th Street in the City of Cleveland, Campbell was seriously injured during a fist fight with several unidentified males (R. 104, 105). He was confined to his home and unable to return to his job until November of 1975. He did not return, however, because Sheriff Kreiger fired him in December of 1975.

During the month of July, 1975, Campbell received several visits from high-ranking officers of the Cuyahoga County Sheriff's Department at his home. All of these visitors were uninvited (R. 108). During each of these visits, Campbell underwent extensive interrogation pertaining to xerox copies, notes and activity reports that he had kept pertaining to irregularities in the operation of the Sheriff's Department and more specifically in Division 4 (R. 110-111). Although there were many demands to turn these records over to these Sheriff's Department Officers, Campbell refused to comply with their demands (R. 112). (All of the material possessed by Campbell were his own notes and copies of his reports; none of which belonged to the Cuyahoga County Sheriff's Department.)

On August 1, 1975, Campbell was called by petitioner on the telephone and was requested to meet him at the

East Town Motel the next day (R. 112). Campbell, his wife Judy, and Phillip Vari arrived at the East Town Motel at approximately 9:00 p.m. on August 2, 1975. They sat in the lounge and remained there approximately three hours having drinks and conversation with petitioner throughout the evening (R. 114). During this conversation Payne offered Judy Campbell a job at the East Town Motel. Throughout the evening the conversation changed to a more serious tone and centered upon the visits to Campbell's home during the month of July by officials of the Sheriff's Office and whether Campbell was cooperating with these officials. Payne then asked Campbell for all of his notes and records and Campbell refused to turn them over (R. 116). Payne then asked Campbell if he felt there was enough incriminating evidence against Sheriff Kreiger which would allow Payne to become the next Sheriff (R. 117). After Campbell refused to turn any of his records over to Payne, he was told that he would "never get to court with them." (R. 119). At this point Campbell and his party left the East Town at approximately 12:15 a.m. (R. 119). Campbell remained on sick leave until November 3, 1975, when he was ruled able to return to work (R. 225). Campbell was fired by Sheriff Kreiger in December of 1975.

Sims Goodman, Jr. worked as an informant for the County Sheriff's Department, Cleveland Police Department, and the Federal Narcotics Bureau. Goodman teamed up with Donald Campbell to make narcotics purchases at a dope house run by Frank Sumpter located at 8416 Hough Avenue, Cleveland, Ohio (R. 281). Goodman was present during the raid on Sumpter's establishment of May 9, 1975 and also observed money and other evidence on the desks in Division 4 headquarters after this raid (R. 296, 299, 300). On April 19, 1975, Goodman was in the area of 10001 Cedar Avenue when the Sheriff's Office Division 4 conducted its

raid at approximately 5:00 a.m. in the morning (R. 302, 304). He testified as seeing "high rollers" known as Big Jordan and Ivan Lapsley exiting the establishment after the Sheriff's Department's arrival (R. 307). From his prior experience as a "door shaker" at various after hours places in the City of Cleveland, he knew what weapons these men carried about their person (R. 308). He described their weapons as being nickel-plated 9 millimeter automatics with snow white grips (R. 309, 310). Approximately three days after the above raid Goodman had occasion to ask Big Jordan for his pistol at Goldie's Lounge. He was handed a black pistol with brown grips on same (R. 311). Cross-examination of Goodman revealed the following (R. 369-371):

"Q. You didn't see it that night?

A. No, sir.

Q. What did you see that night?

A. I saw a different automatic.

Q. Was that the one the government issued?

A. It's like a government issue, yes.

Q. And at that time did you have any conversation with Mr. Lapsley about the gun?

A. Yes, sir.

Q. You had some conversation?

A. Yes, sir. I said, 'Man, where your piece at?'

Q. What did he say?

A. His reply was, 'Some bright nigger got it.'

Q. Sir?

A. 'Some bright nigger got it.'

Q. Did you have any further conversation?

A. No, sir. I just presumed I knew where it went.

Q. Did you have any further conversation with Mr. Lapsley relative to the gun?

A. No, not about the gun.

Q. Did Mr. Jordan come in the same night?

A. Yes. Sometime along about daybreak, it was a big game.

Q. Did you have occasion to shake him down?

A. I just asked him.

Q. And he gave you the weapon?

A. He gave me the weapon.

Q. What was the description of that?

A. A government issue, black with brown handles.

Q. Did you have any conversation with him?

A. No. I told him I knew where it went.

Q. Were you present when this white-handled 9 millimeter disappeared?

A. No, sir.

Q. You didn't see anybody take it?

A. No, sir.

Q. And he didn't tell you anybody took it, did he?

A. Not that particular time.

Q. Well, did he tell you later?

A. Yes, sir.

Q. When was that?

A. It was an occasion at a hotel downtown, the Holiday Inn that's on 20th something.

Q. When was that?

A. Maybe about a week later.

Q. A week later?

A. Yes.

Q. You met him at the Holiday Inn?

A. Yes, uh huh.

Q. And you had conversation about this weapon?

A. Yes. I was kidding with him about his gun.

Q. Who did he tell you took it, then?

A. He said, 'That nigger Payne got my gun.'

Q. 'That nigger Payne got the gun.'

A. Yes.

Q. And that's the night of the raid on April 19th at 10001 Cedar?

A. Well, I filled that part in myself.

Q. You filled in that part—

A. Uh huh, with him face to face, and he didn't deny it.

Q. Let me finish my question.

Mr. Jordan never told you that it was taken on April 19th, 1975, at 10001 Cedar Avenue, by Payne, did he?

A. No, he never came right out and said that.

Q. And Mr. Jordan is still out in that area, is he not?

A. He's still out on the street, yes.

Q. And so is Mr. Lapsley?

A. Yes.

Q. And of course when you talked to Mr. Lipold and Mr. Walsh, last Thursday, you told them this, didn't you?

A. Yes.

Q. And you told them you had the conversation with these two gentlemen about the guns, didn't you?"

Judy Campbell, Donald Campbell's wife of twelve years and mother of their two children, testified to being present in their home during two or three of the visits by officials of the Sheriff's Office in the month of July, 1975 (R. 415, 416). She indicated that one of these visits by Major Kulis and Marion Koscewski lasted 10 1/2 hours (R. 418). On August 2, 1975, she accompanied Donald Campbell and Phillip Vari to the East Town Motel where they remained for approximately three hours (R. 421). She described to the jury how the conversation changed from a pleasant note to one of blatant intimidation and corroborated Donald Campbell's testimony concerning this count of the indictment. Upon hearing the words, "You'll never get to court" she stated she left the East Town because "She was afraid." (R. 423-426). She further testified that her husband's notes and reports that he had been saving were stolen in a home burglary (R. 427). In describing the 10 1/2 hour visit by the aforementioned officials of the Sheriff's Department in July she vividly described how she herself was threatened with having her character maligned if her husband did not cooperate with them and turn over that which they were requesting. The only way she got these officials to leave their home that night was by threatening to call the Westlake Police Department (R. 461).

Phillip Vari, a Deputy Sheriff, and partner of Donald Campbell, corroborated the meeting and subsequent threats at the East Town Motel on August 2, 1975 (R. 470-477). When asked if he reported the intimidation and other irregularities which he described to Sheriff Kreiger, Vari testified how he attempted to do so and Kreiger slammed the door in his face, and that "no one would listen to me." (R. 499-501).

James Marino, a reporter for the Cleveland Press for 4 1/2 years assigned to the Criminal Courts beat, testified to knowing petitioner for the last three years. As he had done on previous occasions, Marino accompanied the Division 4 officials at the Cedar Avenue raid on April 4, 1975 (R. 505). Marino saw firearms and other evidence confiscated and removed from 10001 Cedar that morning. He further testified that Payne specifically told him *six* handguns and one shotgun were seized and fifty-two people were arrested at this raid (R. 506, 507). He reduced this information to a news article which was admitted as State's Exhibit 5 (R. 508).

Defense Evidence

Deputy Edward Thornton testified that neither Campbell nor Payne were up in Division 4 headquarters when the inventory and the theft of firearms allegedly occurred on April 9, 1975 (R. 626). He stated that between forty-five and fifty people were arrested that particular night. He further described the methods used by the Sheriff's Department in placing a yellow tag on each weapon that is seized on any of their raids (R. 633). Thornton himself found no weapons that particular night (R. 641).

Deputy George Burress was at the raid on April 19, 1975 and testified that forty-four males and eleven females were arrested that night (R. 659). He further testified

that Payne was not present in Division 4 headquarters on the morning of the alleged thefts (R. 661). He also testified that Campbell was not upstairs that morning after the raid and that Deputy Thornton was also not up in Division 4 headquarters after the raid (R. 682, 683). (Thornton testified that he assisted Burress in preparing the inventory after the raid in Division 4 headquarters.) Burress testified that no automatic weapons were seized; while Thornton testified there was one automatic weapon seized (R. 689). Burress testified that the inventory took between one and two hours to complete (R. 690). Thornton testified that this procedure took thirty-five minutes. Burress further testified as being involved in the Sumpter raid on May 9, 1975; but when shown a copy of his official report about his activities during this raid he stated that the signature upon that report was not his and that someone else prepared it! (R. 712, 713) (See State's Exhibits 6 and 6A).

Powell Caesar, a reporter for the Call and Post Newspaper was present at the raid on April 19, 1975 at 10001 Cedar Avenue. He testified as observing various persons being searched and seeing some weapons dropped to the floor (R. 724). He took forty photographs of this particular raid, some of which were offered as Defense Exhibits (R. 725). Caesar stated that he saw four handguns and one shotgun seized on the night in question (R. 727); but he presented *no* photographs of any weapons, claiming that they did not photograph well (R. 736). He further described observing stolen clothing on the premises at Cedar Avenue and presented photographs of same but no clothing appeared on any search warrant return or inventory filed subsequent to this raid (R. 746).

Larry Bly was a Deputy Sheriff assigned to Division 4 headquarters on April 19, 1975 and assisted in transport-

ing evidence from 10001 Cedar to Division 4 headquarters after the raid. He testified that Campbell was not upstairs subsequent to this raid on April 19, 1975 (R. 759-761). Based upon his prior experience in Division 4, Bly expected to find weapons at the Cedar Avenue raid and described how weapons seized are tagged and transported in plastic bags from the scene of the raid back to Division 4 (R. 780, 822).

Lee Jordan, a.k.a. "Big Jordan" testified to knowing petitioner for the last six years (R. 854). He stated that he ran a grocery store and that he never owned a gun (R. 855). He further denied ever being on Cedar Avenue, more particularly at 10001 Cedar on April 19, 1975; and further stated that he never went anywhere other than to his store (R. 856). He further testified to knowing Ivan Lapsley who he described as "Van" for the last ten years (R. 863). On cross-examination he described his 1973 Cadillac as being worth $12,000, that he was familiar with the term "door shaker" and then admitted owning a .38 caliber handgun (R. 868, 869).

Ivan Lapsley testified to knowing petitioner for at least six or seven years. He listed his occupation as being the manager of a grocery store (R. 881). He denied that Sims Goodman ever worked for him running numbers and further denied ownership of a 9 millimeter semi-automatic. He further stated that he never frequented Goldie's Lounge (R. 882). He described his automobile as being a 1975 Cadillac Fleetwood, that he has known "Big Jordan" for twenty years and that he was not at 10001 Cedar Avenue on April 19, 1975 (R. 886-887, 896).

Deputy Earnest Graves testified to his involvement in the Sumpter raid on May 9, 1975. He assisted in counting the money seized in this raid and observed money taken into petitioner's office by Major Payne himself but did not

see anyone remove any money from Division 4 headquarters (R. 921, 922).

Keldon Casey testified to knowing petitioner for at least five years and that he was at the East Town Motel on August 2, 1975 (R. 936, 937). Casey described how the petitioner introduced him to three white people, remembering their names to be Campbell and Vari and further stated that he was positive Mrs. Campbell had blonde hair (R. 939, 949). He further testified that he remained at the table with the Campbells and Vari for three and one-half hours until 2:00 a.m. when they left. He testified he had never met any of these people before; they were complete strangers; they talked about the band and other small talk and he denied any heated argument or discussion between the petitioner and his guests (R. 964, 965).

Marion Koscewski, Sheriff Kreiger's Chief Administrative Assistant, testified he was at the Cedar Avenue raid on April 19, 1975, and did not see Major Payne back at Division 4 headquarters after the raid (R. 981). He admitted visiting Campbell at his home in July of 1975 with Major Kulis and that they took two statements from Campbell which took 10 1/2 hours (R. 987, 993). While being at the April 19th raid Koscewski was a professional photographer and described his function as being to photograph evidence in its place. On cross-examination, after being asked why he presented no photographs of evidence seized on the night in question Koscewski testified this his flash malfunctioned. He stated this had happened to him six times before and yet carried no spare flash attachment (R. 1001, 1002). He testified that fifty-two people were arrested at the raid on April 19, 1975 (R. 1007). Koscewski arrived at the East Town Motel just as the Campbells were leaving on August 2, 1975, and described Judy Campbell's hair as being "light." (R. 1023).

Captain Ronald Brown testified to his participation in the Cedar Avenue raid on April 19, 1975. He had occasion to search some of the occupants of that premises and seized one handgun from an unidentified male patron. He saw other handguns seized but could not describe the number and type of weapons involved (R. 1066). Brown admitted to making four uninvited visits to the home of Campbell during the month of July and took at least one statement from Campbell during his period of time. He stated that he was acting on orders of Sheriff Kreiger in making these visits. Brown then described several allegations that were being circulated against Donald Campbell concerning his conduct both on and off duty but admitted on cross-examination that these allegations were never proven to be true (R. 1904-96).

Detective Hosea Garner testified that more than fifty people were arrested at the Cedar Avenue raid on April 19, 1975 (R. 1111). He denied handing two 9 millimeter handguns to Major Payne in Division 4 headquarters on May 9, 1975 (R. 1115). He further denied handing $250 in cash to Payne in Division 4 headquarters on May 9, 1975 following the Sumpter raid (R. 1140). On cross-examination, Garner was allowed to review his official report of the April 19th raid wherein he described forty-four people being arrested (R. 1189). Also, on cross-examination, he was shown a photograph depicting clothing seized in the Cedar Avenue raid; but he admitted that this clothing never made it back to Division 4 headquarters (R. 1192). Garner also testified that petitioner was not in Division 4 headquarters after the raid on April 19, 1975 (R. 1197).

Rebuttal

Judy Campbell was the State's single rebuttal witness. She produced State's Exhibit 11, a photograph taken at the

table in the East Town Motel on August 2, 1975 (R. 1260-61). In this color photograph (which was autographed by newscaster Furnell Chapman and the bandleader Redd Holt), appear Donald Campbell, Judy Campbell, and Phillip Vari. Not only are they the only people sitting at the table, but Judy Campbell's hair is dark brown. Se further testified that she never met a Keldon Casey and that no one other than Major Payne sat with them at their table that evening (R. 1262, 1263).

REASONS FOR DENYING THE WRIT

1. Where an indictment for theft in office contains all of the elements of the offense plus an additional material allegation of fact, and the trial court instructs the jury that the additional material allegation of fact is one of the essential elements of the offense which must be proven beyond a reasonable doubt, and the jury returns a guilty verdict on all of the elements of that offense plus the material fact allegation, the defendant's Sixth and Fourteenth Amendment rights are not violated where he was sufficiently apprised of the specific charges which he must defend by an indictment which was not misleading, was unambiguous and precise in that it enabled him to prepare a meaningful defense and avoid surprise.

Petitioner seeks to penalize the State for undertaking a heavier burden of proof than was necessary in order to convict him of theft in office. We note with interest that no objection was ever raised at the trial level to the wording of either the indictment, bill of particulars, charge to the jury or verdict forms. The reason for no objection by petitioner's counsel at the trial stage is rather obvious. It is

a windfall upon the accused to have the prosecution, who has the burden of proving each and every element of the offense charged by evidence beyond a reasonable doubt, undertake to prove an additional, unnecessary and surplus element in the offense of theft in office. Why should he object when benefit only enures to his side of the table and a detriment upon the prosecution? He knows, by means of the indictment and bill of particulars what charges are lodged against him and now he must defend against them.

If the State wants to show that the guns were not only in possession of the Sheriff's Department at the time of their taking but were indeed "lawfully seized" in that raid, let them try to prove it. The point is, how has the petitioner been prejudiced by the appellate court ruling that the trial court did not err when he charged the jury on the issue of lawful seizure of the weapons? The appellate court did, after all, find sufficient evidence on each element of the offense charged to sustain a conviction. The fact that the appellate court ruled that the additional material allegation of fact in the indictment need not be proven in no stretch of the imagination can be construed as being a denial of fair notice of the specific charges against which he must defend as outlined in *Faretta v. California*, 422 U.S. 806 (1975) and *Russell v. United States*, 369 U.S. 749 (1912).

Petitioner's further contention that the action of the appellate court altered the charge originally brought against the accused in the course of affirming his conviction does not reflect the existing state of law. His reliance upon this Court's decision in *Cole v. Arkansas*, 333 U.S. 196 (1948) is, indeed, misplaced when we compare both fact situations. In *Cole, supra*, convictions were had in an Arkansas court under an information which charged defendants with violation of Section 2 of an Arkansas statute. On appeal to the state supreme court, however, that court affirmed the convictions on the basis, not of Section 2, but of Section 1 of the statute, failing to consider either the sufficiency of the evidence to sustain the convictions under Section 2 or the constitutional objections raised by the appellants to that section. In an opinion by Justice Black, it was held that an affirmance of this kind had the effect of convicting the defendants without a trial, and was therefore a violation of procedural due process under the Fourteenth Amendment. We heartily agree with the contention that "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *DeJonge v. Oregon*, 299 U.S. 353, 362, 81 L. Ed. 278, 282, 57 S. Ct. 255.

Again, petitioner's attempt to characterize the instant case with *Cole* has no merit. The appellate court in *Cole* affirmed petitioner's convictions as though they had been tried and convicted of a separate and distinct section of a statute which was substantially different and distinct from the offense charged. Accordingly, this Court felt constrained to hold that petitioners were denied safeguards guaranteed by due process of law—"safeguards essential to liberty in a government dedicated to justice under law." *Cole, supra*, p. 202.

Contrary to petitioner's insistence that the appellate court "altered" the offense charged in the indictment, the most that can be read out of their affirmance is that they would not set aside the jury's finding of guilt and, while doing so, ruled that the state *need not* have proved the "lawful seizure of the pistols in question." Nowhere in the majority opinions can be found an assertion that the state failed to prove that the weapons were lawfully seized.

2. An affirmance of a conviction for theft in office by a state appellate court on the ground that the state was not required to prove a material allegation of fact in the indictment where it has proved all of the essential elements of the crime charged beyond a reasonable doubt, conforms to due process of law, as the validity of petitioner's conviction was appraised on consideration of the case as it was tried and as the issues were determined in the trial court, and petitioner was fairly informed of the specific charges to which he had the opportunity to fully defend.

We couldn't agree more with petitioner that the state's theory of the case, from the outset, was that the theft in office conviction was predicated on two handguns seized from 10001 Cedar Avenue. Although not necessary, the indictment and bill of particulars spelled out that these weapons had been lawfully seized by the Sheriff's Office. Evidence at trial was voluminous in this regard. All the state need prove for a theft in office conviction was that the subject of the theft was in the custody of the sheriff—and not where the sheriff had seized the property. But the state wanted to impress upon the jury, and succeeded in doing so, that it could trace these particular handguns to a specific raid conducted by the petitioner. It is rather evident that the jury believed the witnesses produced by the state and disbelieved the witnesses for the petitioner. The state never changed its theory of the case and neither did the appellate court's opinion. At all times the petitioner was apprised of the specific nature of the charges against him. Too often, cases reach this court where an accused had no idea what charges were being pressed against him or who was the subject of the complaint.

In *Russell v. United States*, 369 U.S. 749, cited by petitioner, the petitioners were indicted for failure to answer

questions before a congressional subcommittee. The indictment in that case failed to identify the subject under committee inquiry at the time the witnesses were interrogated.

Nor is petitioner's case aligned with *Groppi v. Leslie*, 404 U.S. 496, 30 L. Ed. 2d 632, decided January 13, 1972. In that case, Groppi led a gathering onto the floor of the Wisconsin State Assembly and was found in contempt for disrupting business. The contempt resolution was adopted without giving notice to or giving petitioner an opportunity to defend himself. This Court reversed, holding that due process was violated by failing to give notice to petitioner or an opportunity for him to respond to the charges.

In the instant case, the state, exercising an abundance of caution and a fair sense of justice, disclosed more of its theory of prosecuting the petitioner than it was legally obligated to. Such good faith and full disclosure cannot in any way conceivable be construed as misleading petitioner into a false sense of security, as petitioner argues. Surely he cannot be serious when he argues that he merely had to create a reasonable doubt before the jury that the guns were lawfully seized and he would be acquitted. This argument is refuted by reading the record of proceedings, wherein we see no objection to testimony concerning the guns and their seizure, no argument to the jury concerning unlawful seizure of the guns, and no objectoin to the jury instructions on "guns lawfully seized." The case, practically speaking, boiled down to credibility of witnesses, that is, the jury believed Donald Campbell and Sims Goodman and disbelieved the defense witnesses.

There was no issue concerning lawful seizure of the guns at the trial level, and this issue should not be permitted to lure this Court into granting certiorari.

3. Testimony concerning the contents of a property tag placed on a piece of evidence is admissible as an exception to the hearsay rule concerning inscribed chattels if the trial court, exercising sound discretion, determines that the testimony of the witness can be substituted for the inscribed chattel itself.

We strongly disagree with petitioner's characterization of Campbell's testimony about the contents of a property tag being a "statement." Prior to this testimony the evidence was that a raid had been conducted by petitioner on Cedar Avenue and weapons, money and gambling devices were brought into the office by Sheriff's personnel. Testimony was further elicited concerning the method of bagging and labeling firearms that were confiscated. Campbell then testified as to what he saw—two pearl-handled pistols in a plastic bag with a yellow label containing an address—"10001 Cedar." How does this situation differ from a witness testifying to a license plate number he observed at a crime or accident scene? There is no distinction. The testimony was circumstantially corroborative evidence that these guns came from the Cedar raid. The jury could draw whatever inference they chose from this testimony. The jury had the right to hear such evidence to decide whether the guns in question were under control of the Sheriff's Office prior to petitioner's removing them. The jury convicted the petitioner of *theft in office*. The appellate court affirmed the petitioner's conviction for *theft in office*. The petitioner knew what he was charged with, the elements of the offense and how he must meet those charges. His vain attempt at refuting those charges failed; and nothing occurred at the trial or appellate level that denied him his rights guaranteed under our Constitution.

CONCLUSION

Due process was served upon petitioner throughout his trial and appeals. Accordingly, we respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*

By: EDWARD M. WALSH
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario
Cleveland, Ohio 44113
Attorneys for Respondent